TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 378.

LUIGI STORTI, APPELLANT,

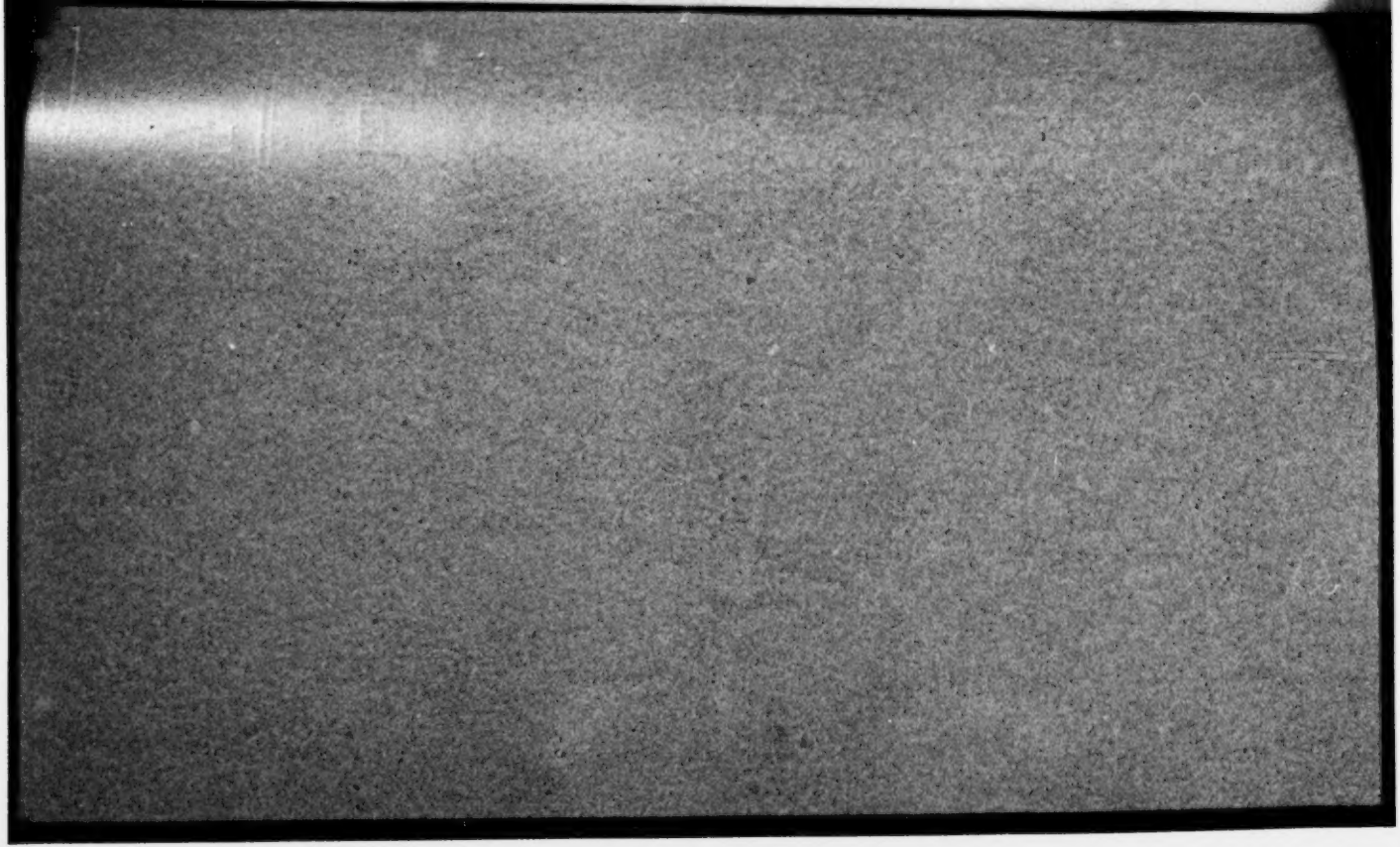
vs.

THE COMMONWEALTH OF MASSACHUSETTS AND BENJAMIN F. BRIDGES, WARDEN OF THE STATE PRISON AT BOSTON, MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JULY 10, 1901.

(18,231.)



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1 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of May, in the year of our Lord one thousand nine hundred and one. Before the Honorable William L. Putnam, circuit judge.

LUIGI STORTI, Petitioner for Writ of *Habeas Corpus.* No. 1122*a*, Law Docket.

The petition in this cause is filed in the clerk's office of this court on the twenty-third day of May, A. D. 1901, and is duly entered at the present May term, A. D. 1901, and is in the words and figures following:

2 *Petition.*

(Filed May 23, 1901.)

To the honorable the justices of the circuit court of the United States for the first circuit:

Respectfully represents Luigi Storti that he is and has always been a subject of the King of Italy and a citizen of the Kingdom of Italy; that he, the said Luigi Storti, is unlawfully restrained of his liberty by Benjamin F. Bridges, the warden of the State prison at Charlestown, in the county of Suffolk, and Commonwealth of Massachusetts, and a citizen of said Commonwealth.

The pretense of such restraint by said Bridges, according to the belief of your petitioner, is that he has been committed to the custody of said Bridges in the State prison at Charlestown aforesaid, pursuant to a warrant, a copy of which is hereto annexed marked "A," then and there to await the execution of the sentence of death for the crime of killing one Michele Colucci on the morning of November 7, 1899, of which crime aforesaid your petitioner was found guilty according to the counts as set forth in the indictment, a copy of which is hereto annexed and marked "B;" that upon the verdict of guilty being rendered by the jury as aforesaid, the court on January 4, 1901, sentenced your petitioner to be executed in accordance with the provisions of chapter 326 of the Acts of 1898 of the legislature of the Commonwealth of Massachusetts, setting the time for said execution to take place within the week beginning Sunday, April 7, 1901, such actual time for execution during the week aforesaid being at the discretion of the said Bridges of the State prison at Charlestown aforesaid; that on April 9, 1901, his excellency, the governor of this Commonwealth, by and with the advice of the council, issued a document, a copy of which is hereto annexed marked "C," and which purported to be issued as a respite in pursuance of section 36 of chapter 214 of Massachusetts Public Statutes the term of which purported respite expired on Saturday, May 11,

1901, and there has been no further lawful pardon, commutation or respite of sentence by the governor, as provided in section 3 of said chapter 326.

3 And your petitioner further represents that on April 30, 1901, he through his then counsel of record, filed a petition for a writ of error to said superior court, and at the same time a petition for a writ of *habeas corpus* was filed in his behalf, in the supreme judicial court, for the county of Suffolk in the Commonwealth of Massachusetts; that both of the said proceedings were reserved for the consideration of the supreme judicial court of the Commonwealth, being the highest court of said State in which a decision could be had and said petitions were duly argued therein, and on May 7, 1901, a decision was rendered denying the writ of *habeas corpus* and directing that the judgment of the superior court should stand. Copies of said proceedings and the opinion thereon, are hereto annexed and marked Exhibits D, E and F, respectively.

And your petitioner further represents that on the afternoon of May 10, 1901, he presented to this honorable court, a petition for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty upon grounds and for reasons therein more fully set forth, to which last-mentioned petition reference is hereby made for a more complete description of said grounds and reasons; and that on the morning of May 11, 1901, said last-mentioned petition was upon hearing dismissed and your petitioner forthwith claimed an appeal to the Supreme Court of the United States, which appeal was duly allowed by the presiding justice and perfected and docketed in the Supreme Court of the United States, on May 18, 1901, and is there still pending and undetermined.

And your petitioner further represents that on May 10, 1901, and subsequent to the filing of the last-mentioned petition, your petitioner filed in the superior court for the county of Suffolk in said Commonwealth, a motion for a new trial, in accordance with the provisions of the Massachusetts Public Statutes, chapter 214, section 28, and accompanied said

4 motion with affidavits in support thereof, and said motion was, before the decision on the last-mentioned petition for a writ of *habeas corpus*, assigned for hearing for the afternoon of May 11, 1901, but upon evidence presented to said superior court that an appeal from the order disallowing said petition for a writ of *habeas corpus* was then pending and undetermined, no action was taken on said motion for a new trial, and the same is still pending in said superior court and undetermined.

And your petitioner further avers that the restraint and imprisonment imposed upon him, in that he is confined by the said Bridges at the State prison at Charlestown aforesaid, for the purpose of awaiting the infliction of the death penalty, according to said chapter 326 of the Acts of 1898, are unauthorized and illegal, because:

I.

Neither chapter 326 of the Acts of 1898 of the Commonwealth of Massachusetts, under the authority and in accordance with the pro-

visions of which the respondent Bridges proposes to inflict the death penalty upon your petitioner, nor any other law, statutory or otherwise of said Commonwealth, provides for any punishment for a person sentenced to death under said chapter 326, where the week appointed by the court for his execution has elapsed without execution having been done upon him, and without any lawful action by the governor, in the way of pardon, commutation or respite, as provided in section 3 of said chapter 326, and the respondent Bridges has no right or authority under the laws of said Commonwealth to hold the prisoner in any further restraint or to inflict the death penalty. Nevertheless, the said Bridges continues to hold your petitioner in restraint at the State prison aforesaid, for the purpose of causing execution to be done upon him by the infliction of the death penalty, contrary to the provisions of the first section of the 14th amendment to the Constitution of the United States, under which your petitioner sets forth and specially claims a right, title, privilege and immunity.

II.

Neither chapter 326 of the Acts of 1898 of the Commonwealth of Massachusetts, under the authority and in accordance with the provisions of which the respondent Bridges proposes to inflict the death penalty upon your petitioner, nor any other law, statutory or otherwise of said Commonwealth, provides for any punishment for a person sentenced to death under said chapter 326, where the week appointed by the court for his execution has elapsed without execution having been done upon him, and without any lawful action by the governor, in the way of pardon, commutation or respite, as provided in section 3 of said chapter 326, and the respondent, Bridges has no right or authority under the laws of said Commonwealth to hold the prisoner in any restraint or to inflict the death penalty. Nevertheless, the said Bridges continues to hold your petitioner in restraint at the State prison aforesaid, for the purpose of causing execution to be done upon him, by the infliction of the death penalty, contrary to the provisions of the first section of the 14th amendment to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America and His Majesty, the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title and immunity.

III.

Section 28 of chapter 214 of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and the superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice

has not been done, or on such terms, or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person, sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or in any court of Massachusetts, and the question as to the rights under the above-mentioned statute of a person sentenced to death as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for the Commonwealth of Massachusetts. The execution of said sentence within said year will deprive your petitioner of his right under said section 28 of chapter 214, of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted and will deprive your petitioner of his life, without due process of law, and will deny him the equal protection of the laws, contrary to the first section of the 14th amendment of the Constitution of the United States, under which your petitioner specially sets up and claims herein, a right, title, privilege and immunity.

7 IV.

Section 28 of chapter 214 of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and the superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, or on such terms or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or in any court of Massachusetts, and the question as to the rights under the above-mentioned statute of a person sentenced to death as

to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for the Commonwealth of Massachusetts. The execution of said sentence within said year will deprive your petitioner of his right under said section 28 of chapter 214, of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted and will deprive your petitioner of his life, without due
8 process of law and will deny him the equal protection of the laws, contrary to the first section of the 14th amendment to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America, and His Majesty, the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title, privilege and immunity.

V.

Section 28 of chapter 214, of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done or on such terms or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or any court of Massachusetts, and the question as to the rights under the above-men-
9 tioned statute of a person sentenced to death as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for the Commonwealth of Massachusetts. The execution of said sentence within said year, will deprive your petitioner of his right under said section 28 of chapter 214 of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted, and of his right to be present at the decision on such motion, which right is guaranteed to him

by article 23 of the treaty now in force between the United States of America and His Majesty, the King of Italy, to wit:

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have full opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

Your petitioner specially sets up and claims herein, a right, title, privilege and immunity in the above respect, under said treaty.

VI.

Under the law of Massachusetts, pending the motion for a new trial, above referred to, which was filed by your petitioner May 10, 1901, execution cannot lawfully be done upon your petitioner by the infliction of the death penalty. Nevertheless, your petitioner apprehends, with reason, that notwithstanding the pendency of said motion for a new trial, and before your petitioner can have a fair opportunity to be heard on said motion and to be present at the decision of said motion, the respondent intends, immediately upon the determination of the appeal above referred to, now pending in the Supreme Court of the United States, in case the decision on said appeal shall be adverse to your petitioner, to forthwith cause execution to be done upon your petitioner and to thereby deprive him of his rights under the first section of the 14th amendment to the Constitution of the United States and under the said article 23 of the treaty between the United States of America, and His Majesty, the King of Italy, under which amendment and which treaty your petitioner specially sets — and claims herein a right, title, privilege and immunity.

VII.

The respondent, Bridges, as warden of the State prison, derives his authority to hold your petitioner in custody solely by virtue of, and only in strict accordance with, the provisions of said chapter 326 of the Acts of 1898, and neither he nor his predecessors in office, prior to the passage of said chapter 326 of the Acts of 1898, ever have had authority to hold in custody a person convicted of the crime of murder in the first degree. No authority is given to the said respondent, as warden of the State prison aforesaid, or in any capacity to retain the custody of your petitioner after the expiration of the week appointed by the court, within which sentence shall be executed, except through the lawful action of the governor as set forth in section 3 of said chapter 326. The week appointed by the court, within which sentence shall be executed upon your petitioner, has expired, and no lawful action has been

taken by the governor, in the way of pardoning the offense,
11 commuting the punishment therefor, or respiting the execution, and said respondent, as said warden, has now no authority of law to retain the custody of your petitioner. Nevertheless said respondent Bridges, continues to hold your petitioner in restraint, at the State prison aforesaid, and is depriving your petitioner of hi, liberty, without due process of law, and is denying to your petitioner the equal protection of the laws contrary to the provisions of section 1 of article 14 of the amendments to the Constitution of the United States, under which your petitioner sets up and specially claims herein a right, title, privilege and immunity.

VIII.

The respondent, Bridges, as warden of the State prison, derives his authority to hold your petitioner in custody solely by virtue of, and only in strict accordance with, the provisions of said chapter 326 of the Acts of 1898, and neither he nor his predecessors in office, prior to the passage of said chapter 326 of the Acts of 1898, ever have had authority to hold in custody a person convicted of the crime of murder in the first degree. No authority is given to the said respondent, as warden of the State prison aforesaid, or in any capacity, to retain the custody of your petitioner after the expiration of the week appointed by the court, within which sentence shall be executed, except through the lawful action of the governor, as set forth in section 3, of said chapter 326. The week appointed by the court, within which sentence shall be executed upon your petitioner, has expired, and no lawful action has been taken by the governor, in the way of pardoning the offense, commuting the punishment therefor, or respiting the execution, and said respondent, as said warden, has now no authority of law to retain the custody of your petitioner.

Nevertheless, said respondent, Bridges, continues to hold
12 your petitioner in restraint, at the State prison aforesaid, and is depriving your petitioner of his liberty, without due process of law, and is denying to your petitioner the equal protection of the laws contrary to the provisions of section 1 of article 14 of the amendments to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America and His Majesty the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title, privilege and immunity.

Wherefor-, your petitioner prays that a writ of *habeas corpus* may be granted and that he may be discharged from such unlawful restraint and imprisonment.

LUIGI STORTI.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

BOSTON, *May* 23, 1901.

Then personally appeared Luigi Storti, who has subscribed the foregoing petition, and made oath that he has had read to him the facts therein set forth, and that said facts are true.

Before me,

WM. M. STOCKBRIDGE,
Justice of the Peace.

WM. M. STOCKBRIDGE,
G. PHILIP WARDNER,
Of Counsel for Petitioner.

13 "A."

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To the sheriff of our county of Suffolk, to such deputy as he may name, and to the warden of our State prison at Boston, in said Commonwealth:

Whereas, at a sitting of our superior court holden at Boston, within and for our said county of Suffolk, for the transaction of criminal business, on the fourth day of January in the year of our Lord nineteen hundred and one, Luigi Storti of said Boston, was convicted of the crime of murder in the first degree, and thereupon by our said court the said Luigi Storti was adjudged and sentenced for said crime to suffer the punishment of death by the passage of a current of electricity through his body, within the week beginning on Sunday, the seventh day of April next, as to us appears of record, a copy of which record we have caused to be hereunto annexed; and whereas a certified copy of the whole record of said conviction and sentence has been delivered to his excellency the governor, as required by law, execution of which sentence remains to be done:

We, therefore, command you said sheriff, to confine him said Luigi Storti in the jail in our said county of Suffolk, until within ten days of Sunday, the said seventh day of April next, being the first day of the week appointed for the execution of said sentence, and thereupon and within said ten days to convey him as secretly as may be to our said State prison, and to deliver him with this our warrant and with a return of your doings hereon to the said warden of said
14 State prison or to the officer performing the duties of said warden.

And we command you, said warden, that you receive him said Luigi Storti and keep him in close custody, as provided by law, until the infliction of the punishment of death upon him, and that on some day to be by you selected within the week beginning on the said Sunday, the seventh day of April next, and at an hour between midnight and sunrise, within the building provided for the purpose adjoining said State prison, agreeably to the provisions of the statute in such case made and provided, you cause execution of

the said sentence of our said court in all respects to be done and performed upon him the said Luigi Storti by causing to pass through his body a current of electricity of sufficient intensity to cause death and continuing the application of such current until he is dead; for all which this shall be your sufficient warrant.

Hereof fail not at your peril, and you said warden are to make return of this warrant with your doings hereon into the office of the clerk of our said court within and for our said county of Suffolk, as soon as may be after you shall have executed the same.

Witness Albert Mason, Esquire, and the seal of our said court, at said Boston, this eighth day of January, in the year of our Lord nineteen hundred and one.

JOHN P. MANNING, *Clerk.*

15 *Record.*

This indictment was found and returned into said superior court by the grand jurors on the ninth day of December, A. D., 1899, when notices of the finding of said indictment, with copies of said indictment, were sent by the clerk of said court to the chief justice of said court and the attorney general of said Commonwealth.

On said day, a copy of said indictment and a notice of its finding by the grand jurors and its entry in said superior court, were delivered by said clerk to the sheriff of said county to be by him delivered to said Storti in the common jail in said county; and on the twelfth day of said December said copy and notice were delivered to said Storti in said jail by said sheriff.

On the twenty-seventh day of said December, said Storti was brought into said court from said jail and was set at the bar, and having said indictment read to him, he said thereof that he was not guilty.

Said Storti thereupon notified said court that he was without counsel and requested said court to assign counsel for his defence, and said Storti was remanded to said jail.

On the twenty-seventh day of April, A. D. 1900, said Storti was brought into said court from said jail and notified said court that he had retained Peter S. Maher, Esquire, as his counsel and withdrew his request that the court assign his counsel for his defence, and said Storti was remanded to said jail.

16 On the eleventh day of June, A. D., 1900, said Storti notified said court that he was without counsel and requested a second time that the court assign counsel for his defence; thereupon the court appointed Peter S. Maher, Esquire, and Clarence W. Rowley, Esquire, counsel for said Storti, and said Storti was notified of said appointment at said jail by the clerk of said court.

On the twenty-fifth day of said June, said Storti was brought into said court from said jail and by his attorneys aforesaid filed a motion to quash said indictment, which motion, after a hearing before Hon. Daniel W. Bond, and Hon. Frederick Lawton, justices of said court, was overruled, and said Storti was set at the bar, and for trial put himself upon the country, and the Commonwealth did

the like by its attorneys, Michael J. Sughrue, Esquire, and John D. McLaughlin, Esquire.

A jury was empanelled and sworn to try the issue, to wit, George R. Whittemore, foreman, and eleven of his fellows, namely, Timothy F. Callahan, John R. Maguire, John B. Kinney, Jacob Shillady, James B. Fuller, John H. West, Clayton O. Dewey, George F. Waldron, Samuel H. Irwin, Donald V. Goodwin and Alfred W. Tilton, who, after hearing and understanding all matters and things concerning the same, returned their verdict on the first day of July, A. D. 1900, and on oath said that said Storti was guilty of murder in the first degree.

The court thereupon extended the time for the filing of exceptions by said Storti until on or before the first day of August, A. D. 1900, and said Storti was remanded to said jail.

17 On the twenty-fifth day of said July, said Storti, by his attorneys, filed exceptions to the rulings of the presiding justices at said trial.

On the tenth day of November, A. D. 1900, said exceptions being examined, and found conformable to the truth, were allowed and were ordered to be transmitted to the supreme judicial court.

On the fourteenth day of November, A. D. 1900, the said Storti, by his attorneys filed an appeal to said supreme court from the order of said superior court overruling said motion to quash.

On the second day of January A. D. 1901, a rescript is received from said supreme court in the words following: "Exceptions overruled."

On the third day of said January a second rescript is received from said supreme court in the words following: "Rescript of January 2, 1901, amended by adding thereto, order overruling the motion to quash the indictment affirmed."

On the fourth day of said January, the said Storti is brought into said court from said jail and is set at the bar to receive sentence.

It is therefore considered and ordered by said court that said Storti, for his offence of murder in the first degree, suffer the punishment of death by the passage of a current of electricity through his body, and that said sentence be executed upon said Storti within the week beginning on Sunday the 7th day of April, in the year of our Lord one thousand nine hundred and one, in the manner prescribed by the laws of said Commonwealth, and that said Storti stand committed in pursuance of said sentence.

All of which appears of record in said superior court. In
18 testimony whereof, I hereunto set my hand and affix the seal of said superior court, at Boston, aforesaid, this eighth day of January in the year of our Lord, one thousand nine hundred and one.

[SEAL.] JOHN P. MANNING, *Clerk.*

19 "B."

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of December, in the year of our Lord one thousand eight hundred and ninety-nine, the jurors for the Commonwealth of Massachusetts, on their oath present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Buccilla, otherwise called Vincenzo Bucillo, of Boston, aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston, aforesaid, with force and arms, in and upon one Michele Callucci, feloniously, wilfully and of their malice aforethought did make an assault; and that the said Storti and Bocielli, with a certain axe the said Callucci, in and upon the head of said Calucci, then and there feloniously, wilfully and of their malice aforethought, did strike, beat and bruise, giving to the said Calucci then and there, with the axe aforesaid, in and upon the head of said Calucci, divers mortal strokes, wounds and bruises, of which said mortal strokes, wounds and bruises the said Calucci on said seventh day of November, at Boston aforesaid, did languish and languishing did live, on which said seventh day of November, the said Calucci at Boston aforesaid, of the said mortal strokes, wounds and bruises, died.

And the jurors aforesaid, upon their oath aforesaid, do say, that the said Luigi Storti and said Vincenzo Bocielli the said Michele Calucci in manner and form aforesaid then and there feloniously, wilfully and of their malice aforethought did kill and mur-
20 der. And the jurors, aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Bucilla, otherwise called Vincenzo Bucillo, did assault and beat Michele Calucci with intent to murder him, by striking him over the head with an axe, and by said assault and beating did kill and murder said Calucci.

And the jurors aforesaid do say, that both counts in this indictment are different descriptions of the same act.

A true bill.

JOHN H. McGEE,
Foreman of the Grand Jury.

JOHN D. McLAUGHLIN,
2d Ass't District Attorney.

21 "C."

The Commonwealth of Massachusetts to all persons to whom these presents shall come, Greeting:

[L. S.] W. Murray Crane.

Whereas, before our superior court begun and holden at the city of Boston within and for the county of Suffolk, on the first Monday of June, in the year of our Lord one thousand nine hundred, Luigi Storti was convicted of the crime of murder in the first degree, and thereafter to wit, on the fourth day of January in the year of our Lord one thousand nine hundred and one, it was considered and ordered by said superior court that said Storti for his offence of murder in the first degree, suffer the punishment of death, by the passage of a current of electricity through his body, and that said sentence be executed upon said Storti within the week beginning on Sunday, the seventh day of April, in the year of our Lord one thousand nine hundred and one, in the manner prescribed by the laws of said Commonwealth, which said sentence remains unexecuted.

And whereas, by section 36 of chapter 215 of our Public Statutes "the governor, by and with advice of council, may respite from time to time, the execution of a sentence of death for stated periods so long as he may deem it necessary to afford him by and with the advice aforesaid, an opportunity of exercising the constitutional right of pardon, and of investigating and considering the facts of the case for that purpose."

Now know ye, that by and with the advice — council, the execution of said sentence of our superior court against said Luigi
22 Storti is respited, the term of respite to expire on Saturday, the eleventh day of May next; of which all our judges, justices, magistrates, and officers of every denomination, especially the warden of our State prison, are to take notice.

Witness his excellency, W. Murray Crane, our governor, with the advice and consent of our council, and our seal hereunto affixed, at Boston, this tenth day of April, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth.

By his excellency, the governor, with the advice of the council.

HERBERT H. BOYNTON,
Deputy Secretary of the Commonwealth.

23 "D."

COMMONWEALTH OF MASSACHUSETTS, *Suffolk County.*

Supreme Judicial Court. Common Law.

LUIGI STORTI
v.
COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Error, as Amended.

To the honorable the justices of the supreme judicial court now sitting at Boston within and for said county of Suffolk:

Respectfully represents your petitioner, Luigi Storti of Boston in the county of Suffolk, as follows:—

That on the ninth day of December A. D. 1899, the grand jurors for the Commonwealth of Massachusetts did find and present to the superior court for the county of Suffolk an indictment, a copy whereof is hereto annexed, marked A,* charging your petitioner with the crime of murder.

On the first day of July A. D. 1900, in the superior court sitting at Boston, within and for the county of Suffolk, for the transaction of criminal business, your petitioner was found guilty upon said indictment of the offence of murder in the first degree.

On the fourth day of January A. D. 1901, your petitioner was sentenced by said superior court, under the provisions of chapter 326 of the Acts of 1898, for his said offence of murder in the first degree, to suffer the punishment of death by the passage of a current of electricity through his body, within the week beginning on Sunday the seventh day of April A. D. 1901. That thereupon your petitioner was committed to the common gaol at Boston
24 aforesaid in pursuance of said sentence, and was there confined until March 28, 1901, when he was removed to the State prison at Boston aforesaid for execution of said sentence.

That on April 9, 1901, his excellency, the governor of Massachusetts, by and with the advice and consent of the council, reprieved your petitioner until May 11, 1901, and your petitioner is now confined in said State prison pursuant to said sentence, and is in charge of Benjamin F. Bridges of Boston aforesaid, as warden of said State prison.

From said March 28, 1901, your petitioner has been, and is now, for the execution of the sentence aforesaid, detained in said prison by said warden, by virtue of the sentence and commitment aforesaid, and of a warrant of said superior court commanding said warden to cause execution of said sentence to be done and performed upon your petitioner by causing to pass through his body a current of electricity of sufficient intensity to cause death, and continuing

* For indictment see record of superior court.

the application of such current until he is dead, a copy whereof is hereto annexed marked B, and by no other authority and for no other reason.

(And your petitioner further says that he is and ever has been a subject of the King of Italy, and that at the time of the commission of the offence of which he was convicted he was in this country and Commonwealth under the provisions of certain treaties between the United States and Italy, and was entitled and is still entitled to all the rights and privileges secured to subjects of the King of Italy by and under the provisions of the aforesaid treaties.)

Therefore your petitioner says that there was error in said proceedings of said superior court, and assigns the error as follows:—

(See page 3.)

Wherefore your petitioner prays,—

First. That a writ of error to said superior court, and a writ of *scire facias* to said Commonwealth, may be issued.

Second. That, pending the decision of this honorable court upon said writ of error, the execution of said sentence imposed upon your petitioner may be stayed.

Third. That the judgment of said superior court sentencing your petitioner may be reversed, and his cause be remanded to said superior court with instructions to discharge your petitioner.

Fourth. For such other and further relief as to your honors may seem meet, and as justice requires.

LUIGI STORTI.

CLARENCE W. ROWLEY,
Counsel for Petitioner.

25 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

BOSTON, *April* 30, 1901.

Then personally appeared Clarence W. Rowley, and made oath that the statements of fact contained in the foregoing petition are true, to the best of his knowledge and belief.

Before me,

JOHN NOBLE,
Justice of the Peace.

Filed April 30, 1901.
Amendment filed and allowed May 2, 1901, as of May 1, 1901.

Amended Assignment of Errors.

First. The sentence was wholly unauthorized and void, as the act under which the petitioner was sentenced provided for a cruel or unusual punishment for the offence of which your petitioner was convicted, contrary to the provisions of article XXVI, of the declaration of rights of the inhabitants of the Commonwealth of Massachusetts, and is in all respects contrary to the provisions of the constitution of this Commonwealth.

Second. The sentence was wholly unauthorized and void, inas-

much as it provides for the infliction of a punishment upon your petitioner which in fact is unusual, is contrary to the provisions of article XXVI of the declaration of rights, and is in all respects contrary to the provisions of the constitution of Massachusetts.

Third. The sentence was wholly unauthorized and void, inasmuch as it inflicts upon your petitioner a punishment which in fact is cruel or unusual, and is prohibited by article XXVI of the declaration of rights, and is in all respects contrary to the provisions of the constitution of Massachusetts.

Fourth. The sentence was wholly unauthorized and void, as section 6 of the Acts of the Year 1898 provided for the infliction of the punishment of death by means which in fact are cruel, unusual, of an uncertain character, and which in fact necessitate for ther successful action a remote combination of circumstances circuitously affecting the functions of organic life, by secret and invisible means, which means, in fact, are unusual, cruel, and unknown to the laws of this Commonwealth, and which punishment is contrary to the provisions of article XXVI of the declaration of rights, and contrary to the provisions of the constitution of Massachusetts.

Fifth. The sentence was wholly unauthorized and void, as the act under which the petitioner was sentenced deprived the petitioner of the right to be present personally in court and apply for a new trial, under the provisions of section 28 of chapter 214 of the
26 Public Statutes, and of being fully heard in his defence by himself, contrary to the provisions of article XII of the declaration of rights.

Sixth. The sentence was wholly unauthorized and void, in that the act under which the petitioner was sentenced provided for the close confinement of the petitioner in a cell in the State prison from the time of his delivery at said prison until his execution, unless he shall be lawfully discharged from such imprisonment, thereby depriving him of the right to be present in court and argue a motion for a new trial, the right to apply for which is secured to him by the provisions of section 28 of chapter 214 of the Public Statutes, or otherwise to be fully heard in his defence by himself, at any time after his delivery at said prison, contrary to the provisions of article 23 of the treaty between the United States and Italy proclaimed November 23, 1871, which right to be present in person and be heard in his defence the petitioner claims is secured to him as a subject of the King of Italy by the aforesaid treaty, and contrary to the provisions of article VI of the Constitution of the United States.

Seventh. That the commitment and detention aforesaid, in pursuance of said sentence, is wholly unauthorized and void, for the reason aforesaid.

CLARENCE W. ROWLEY,
Attorney for Plaintiff in Error.

Filed and allowed May 2, 1901, as of May 1, 1901.
Notice of the within petition is waived.

FREDERICK H. NASH,
Assistant Attorney General.

April 30, 1901.—Writ of error allowed.
OLIVER WENDELL HOLMES, *C. J. S. C.*

Writs of error and *scire facias* issued April 30, 1901. Returnable by order of court on May 1, 1901.

SUFFOLK, *ss:*

Pursuant to the precept of this writ, to me directed, I herewith send the record and process of the suit, and process within mentioned, with all things touching the same, all which are hereto annexed, to the honorable the justices of the supreme judicial court within named.

27 In testimony whereof, I hereunto put my hand and seal this first day of May in the year nineteen hundred and one.

ALBERT MASON,
[SEAL.] *Chief Justice, Superior Court.*

Copy of Superior Court Record.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *To wit:*

At the superior court, begun and holden at the city of Boston within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of December in the year of our Lord one thousand nine hundred.

The Honorable Daniel W. Bond, a justice of said court presiding.

COMMONWEALTH }
v.
LUIGI STORTI. }

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of December, in the year of our Lord one thousand eight hundred and ninety-nine,

The jurors for the Commonwealth of Massachusetts, on their oath present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Buccilla, otherwise called Vincenzo Bucillo, of Boston aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston aforesaid, with force and arms, in and upon one Michele Calucci, feloniously, wilfully and of their malice aforethought did make an assault; and that the said Storti and Bocielli, with a certain axe, the said Calucci, in and upon the head of said Calucci, then and there feloniously, wilfully and of their malice aforethought, did strike, beat and bruise, giving to the said Calucci then and there, with the axe aforesaid, in and upon the head of said Calucci, divers mortal strokes, wounds and bruises, of which said mortal strokes, wounds and bruises the

said Calucci on said seventh day of November, at Boston aforesaid, did languish and languishing did live, on which said seventh day of November, the said Calucci, at Boston aforesaid, of the said mortal strokes, wounds and bruises, died.

And so the jurors aforesaid, upon their oath aforesaid, do
28 say, that the said Luigi Storti and said Vincenzo Bocielli the said Michele Calucci in manner and form aforesaid then and there feloniously, wilfully and of their malice aforethought did kill and murder.

And the jurors, aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Buccilla, otherwise called Vincenzo Bucillo, did assault and beat Michele Calucci with intent to murder him, by striking him over the head with an axe, and by said assault and beating did kill and murder said Calucci.

And the jurors aforesaid do say, that both counts in this indictment are different descriptions of the same act.

A true bill.

JOHN H. McGEE,
Foreman of the Grand Jury.

JOHN D. McLAUGHLIN,
2d Ass't District Attorney.

December 9, 1899.—Returned into said superior court by the grand jurors, and ordered to be filed.

Attest: JOHN P. MANNING, *Clerk.*

Record.

This indictment was found and returned into said superior court by the grand jurors on the ninth day of December A. D. 1899, when notices of the finding of said indictment, with copies of said indictment, were sent by the clerk of said court to the chief justice of said court and the attorney general of said Commonwealth.

On said day a copy of said indictment, and a notice of its finding by the grand jurors, and its entry in said superior court, were delivered by said clerk to the sheriff of said county to be by him delivered to said Storti in the common jail in said county; and on the twelfth day of said December said copy and notice were delivered to said Storti in said jail by said sheriff.

On the twenty-seventh day of said December said Storti was brought into said court from said jail and was set at the bar, and, having said indictment read to him, he said thereof that he was not guilty.

Said Storti thereupon notified said court that he was without counsel, and requested said court to assign counsel for his defence, and said Storti was remanded to said jail.

On the twenty-seventh day of April A. D. 1900 said Storti was brought into said court from said jail and notified said court
29 that he had retained Peter S. Maher, Esquire, as his counsel and withdrew his request that the court assign him counsel for his defence, and said Storti was remanded to said jail.

On the eleventh day of June A. D. 1900 said Storti notified said court that he was without counsel, and requested a second time that the court assign counsel for his defense. Thereupon the court appointed Peter S. Maher, Esquire, and Clarence W. Rowley, Esquire, counsel for said Storti, and said Storti was notified of said appointment at said jail by the clerk of said court.

On the twenty-fifth day of said June said Storti was brought into said court from said jail and by his attorneys aforesaid filed a motion to quash said indictment, which motion, after a hearing before Honorable Daniel W. Bond and Honorable Frederick Lawton, justices of said court, was overruled, and said Storti was set at the bar, and for trial put himself upon the country, and the Commonwealth did the like by its attorneys, Michael J. Sughrue, Esquire, and John D. McLaughlin, Esquire.

A jury was empanelled and sworn to try the issue, to wit, George R. Whittemore, foreman, and eleven of his fellows, namely, Timothy F. Callahan, John R. Maguire, John B. Kinney, Jacob Shillady, James B. Fuller, John H. West, Clayton O. Dewey, George F. Waldron, Samuel H. Irwin, Donald V. Goodwin, and Alfred W. Tilton, who, after hearing and understanding all matters and things concerning the same, returned their verdict on the first day of July A. D. 1900, and on oath said that said Storti was guilty of murder in the first degree.

The court thereupon extended the time for the filing of exceptions by said Storti until on or before the first day of August A. D. 1900, and said Storti was remanded to said jail.

On the twenty-fifth day of said July said Storti, by his attorneys, filed exceptions to the rulings of the presiding justices at said trial.

On the tenth day of November A. D. 1900, said exceptions, being examined and found conformable to the truth, were allowed and were ordered to be transmitted to the supreme judicial court.

On the fourteenth day of said November the said Storti, by his attorneys, filed an appeal to said supreme court from the order of said superior court overruling said motion to quash.

On the second day of January A. D. 1901, a rescript is received from said supreme court in the words following: "Exceptions overruled."

On the third day of said January a second rescript is received from said supreme court in the words following: "Rescript of Jan. 2, 1901, amended by adding thereto, order overruling the motion to quash the indictment affirmed."

On the fourth day of said January the said Storti is brought into said court from said jail and is set at the bar to receive sentence.

It is therefore considered and ordered by said court that said Storti, for his offense of murder in the first degree, suffer the punishment of death by the passage of a current of electricity through his body, and that said sentence be executed upon said Storti within the week beginning on Sunday, the seventh day of April, in the year of our Lord one thousand nine hundred and one in the manner

prescribed by the laws of said Commonwealth, and that said Storti stand committed in pursuance of said sentence.

On the eighth day of said January a certified copy of the whole of said record is delivered to the governor of said Commonwealth by the clerk of said court, and immediately thereafter a warrant under the seal of said court, stating the conviction and sentence of said Storti and the week appointed for the execution thereof, is delivered to the sheriff of said county by said clerk, and a certified copy of said warrant is transmitted to the warden of the State prison in said county.

All of which appears of record in said superior court.

In testimony whereof, I hereunto set my hand and affix the seal of said superior court, at Boston aforesaid, this first day of May in the year of our Lord one thousand nine hundred and one.

JOHN R. CAMPBELL,
Assistant Clerk.

[SEAL.]

Plea of Defendant in Error.

And now comes The Commonwealth of Massachusetts, the defendant in error, and says that there is not any error in the record and proceedings aforesaid or in giving the judgment and sentence aforesaid, or in the commitment and detention aforesaid; and the defendant in error prays that the court may proceed to examine the record and proceedings aforesaid and the matters aforesaid assigned for error, and that the judgment and sentence aforesaid in form aforesaid given may be in all things affirmed.

And further answering, the defendant in error says that the petitioner's assignments of errors in fact, to wit, that the sentence provides for the infliction of a punishment upon the petitioner which in fact is unusual, or which in fact is cruel or unusual, are not open to the petitioner in this court, for that the legislature has decided all said matters of fact, and the opinion of the legislature upon said matters of fact is not subject to review by this court; but if evidence be admitted that the infliction of said punishment is
31 the infliction of an unusual punishment, or of a cruel or unusual punishment, then the defendant in error says that the infliction of said punishment is not the infliction of an unusual punishment, or of a cruel or unusual punishment.

FREDERICK H. NASH,
Assistant Attorney General for the Commonwealth of Massachusetts.

Filed May 2, 1901.

Reservation.

Against the objection of the attorney general, the second, third, and fourth assignments of error came on to be heard before me as assignments of errors in fact. It was conceded by the Commonwealth that the petitioner in this writ of error is a citizen of the King of Italy; that the punishment of death by electricity has never been inflicted in this Commonwealth and that electricity has never

been used as a means of punishment for any offence in this Commonwealth.

I find as a fact that if electricity is properly applied it is necessarily fatal, and causes death practically instantaneously; that in causing death it is more speedy, less painful, and more humane than is hanging. I further find as a fact that it is not of an uncertain character; that it does not in fact necessitate for its successful action a remote combination of circumstances circuitously affecting the functions of organic life by secret and invisible means.

I also find that by the Revised Statutes of Maine (1883), by the Revised Statutes of Illinois (1899), Revised Statutes of Arizona (1887), Statutes and Code of Washington (1891), Code of Tennessee (1896), Revised Statutes of Florida (1892), Code of Alabama (1896), Revised Statutes of New York (1829), and Revised Statutes of Ohio (1890), it is provided that the means of carrying into effect the sentence of death shall be by hanging by the neck; and that by the statutes of Ohio (revision of 1900) it is provided that the means of carrying into effect the sentence of death shall be by causing a current of electricity to pass through the body sufficient to cause death; and that a statute was enacted in New York in January, 1888, providing that the punishment of death shall be inflicted by causing a current of electricity to pass through the body of the convict, and such current must be continued until the convict be dead.

I find as a fact that the second, third, and fourth assignments are not true.

At the request of the petitioner I reserve the case for the full court.

WILLIAM CALEB LORING, *J. S. J. C.*

May 4, 1901.

Copy.
Attest: —— ——, *Clerk.*

32 "E."

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk County. }

Supreme Judicial Court. Common Law.

In the Matter of LUIGI STORTI.

Petition for Writ of Habeas Corpus.

To the honorable the justices of the supreme judicial court:

Your petitioner, Joseph Santosuosso of Boston in the county of Suffolk and Commonwealth of Massachusetts, respectfully represents, on behalf of Luigi Storti of said Boston, that the said Luigi Storti is unlawfully restrained of his liberty by Benjamin F. Bridges, the warden of the State prison at Charlestown in the county of Suffolk in said Commonwealth.

The pretence for such imprisonment by said Bridges, according to the belief of this complainant, is that the said Luigi Storti has

been committed to the custody of the said Bridges in the State prison at Charlestown aforesaid, pursuant to a warrant, a copy of which is hereto annexed marked A, then and there to await the execution of sentence of death for the crime of killing one Michele Colucci on the morning of November 7, 1899, of which crime aforesaid the said Luigi Storti was found guilty according to the counts as set forth in the indictment, a copy of which is hereto annexed marked B; that upon the verdict of guilty being rendered by the jury as aforesaid, the court, on January 4, 1901, sentenced the said Luigi Storti to be executed in accordance with the provisions of chapter 326 of the Act- of 1898 of the Legislature of this Commonwealth, setting the time for said execution to take place within the week beginning Sunday, April 7, 1901, such actual time for execution during the week aforesaid being at the discretion of the said Bridges, warden of the State prison at Charlestown aforesaid; that on April 9, 1901, the said Luigi Storti was respited by his excellency, the governor of this Commonwealth, by and with the advice of the council, according to a warrant, a copy of which is hereto annexed marked
33 C, and in pursuance to section 36 of chapter 215 of the Massachusetts Public Statutes, the term of which respite was to expire on Saturday, May 11, 1901.

And your petitioner, on behalf of Luigi Storti, further avers that the restraint and imprisonment imposed upon the said Luigi Storti, in that he is confined by the said Bridges at the State prison at Charlestown aforesaid, for the purpose of awaiting the infliction of the death penalty, according to said chapter 326 of the Acts of 1898, are unauthorized and illegal, because—

First. The punishment- imposed by said act of the legislature, and by said sentence of the court, are in violation of section 26 of the declaration of rights of the constitution of this Commonwealth, which provides that "no magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

Second. The punishment provided by section 6, chapter 326, of the Acts of 1898 of the Legislature of Massachusetts, is in violation of section 26 of the declaration of rights of the constitution of this Commonwealth in that it is a "cruel punishment."

Third. The punishment provided by section 6, chapter 326, of the Acts of 1898 of the Legislature of Massachusetts, is in violation of section 26 of the declaration of rights of the constitution of this Commonwealth in that it is an "unusual punishment."

Fourth. The punishment provided by sections 2, 3, 4, and 5 of chapter 326 of the Acts of 1898 of the Legislature of Massachusetts, is in violation of section 26 of the declaration of rights of the constitution of this Commonwealth in that it is a "cruel punishment."

Fifth. The punishment provided by sections 2, 3, 4, and 5 of chapter 326 of the Acts of 1898 of the Legislature of Massachusetts, is in violation of section 26 of the declaration of rights of the constitution of this Commonwealth in that it is an "unusual punishment."

Sixth. The discretion purported to be given to the said Bridges,

warden of the State prison at Charlestown aforesaid, to determine the precise time, within the week designated, at which the said Luigi Storti is to be executed, according to section 2, chapter 326, of the Acts of 1898 of the Legislature of the Commonwealth of Massachusetts is in violation of section 30 of the declaration of rights of the constitution of this Commonwealth in that there is delegated to an officer of the executive department of the government of Massachusetts a judicial power, which said power, to wit, the fixing of the precise day on which to inflict the death penalty, should be exercised only by the judicial department of the government of this Commonwealth.

Whereby your petitioner, in behalf of the said Luigi Storti, prays that a writ of *habeas corpus* may be granted, and that he may be discharged from such unlawful restraint and imprisonment.

JOSEPH SANTOSUOSSO.

34 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

BOSTON, *April* 26, 1901.

Then personally appeared the above-named Joseph Santosuosso, and made oath that he has read the foregoing petition, by him subscribed, and knows the contents thereof, and that the statements therein contained are true, according to the best of his knowledge, information, and belief.

Before me,

WILLIAM M. STOCKBRIDGE,
Justice of the Peace.

Filed April 30, 1901.

A.

Warrant.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To the sheriff of our county of Suffolk, to such deputy as he may name, and to the warden of our State prison at Boston, in said Commonwealth:

Whereas, at a sitting of our superior court holden at Boston, within and for our said county of Suffolk, for the transaction of criminal business, on the fourth day of January in the year of our Lord nineteen hundred and one Luigi Storti of said Boston, was convicted of the crime of murder in the first degree, and thereupon by our said court the said Luigi Storti was adjudged and sentenced for said crime to suffer the punishment of death by the passage of a current of electricity through his body, within the week beginning on Sunday, the seventh day of April next, as to us appears of record, a copy of which record we have caused to be hereunto annexed; and whereas a certified copy of the whole record of said conviction and sentence has been delivered to his excellency the

governor, as required by law, execution of which sentence remains to be done:

We, therefore, command you said sheriff to confine him said Luigi Storti in the jail in our said county of Suffolk, until within ten days of Sunday, the said seventh day of April next, being the first day of the week appointed for the execution of said sentence, and thereupon and within said ten days to convey him as secretly as may be to our said State prison, and to deliver him with this our warrant and with a return of your doings hereon to the said warden of said State prison or to the officer performing the duties of said warden.

And we command you, said warden, that you receive him said Luigi Storti and keep him in close custody, as provided by law, until the infliction of the punishment of death upon him, and that on some day to be by you selected within the week beginning on the said Sunday the seventh day of April next, and at an hour between midnight and sunrise, within the building provided for the purpose adjoining said State prison, agreeably to the provisions of the statute in such case made and provided, you cause execution of the said sentence of our said court in all respects to be done and performed upon him the said Luigi Storti by causing to pass through his body a current of electricity of sufficient intensity to cause death and continuing the application of such current until he is dead; for all which this shall be your sufficient warrant.

Hereof fail not at your peril, and you said warden are to make return of this warrant with your doings hereon into the office of the clerk of our said court within and for our said county of Suffolk, as soon as may be after you shall have executed the same.

Witness Albert Mason, Esquire, and the seal of our said court, at said Boston, this eighth day of January in the year of our Lord nineteen hundred and one.

JOHN P. MANNING, *Clerk.*

Record of Superior Court.

This indictment was found and returned into said superior court by the grand jurors on the 9th day of December A. D. 1899, when notices of the finding of said indictment, with copies of said indictment, were sent by the clerk of said court to the chief justice of said court and the attorney general of said Commonwealth.

On said day a copy of said indictment, and a notice of its finding by the grand jurors and its entry in said superior court, were delivered by said clerk to the sheriff of said county to be by him delivered to said Storti in the common jail in said county; and on the 12th day of said December said copy and notice were delivered to said Storti in said jail by said sheriff.

On the 27th day of said December said Storti was brought into said court from said jail and was set at the bar, and, having said indictment read to him, he said thereof that he was not guilty.

Said Storti thereupon notified said court that he was without

counsel, and requested said court to assign counsel for his defence, and said Storti was remanded to said jail.

On the 27th day of April A. D. 1900 said Storti was brought into said court from said jail and notified said court that he had retained Peter S. Maher, Esq., as his counsel and withdrew his request that the court assign him counsel for his defence, and said Storti was remanded to said jail.

On the 11th day of June A. D. 1900 said Storti notified said court that he was without counsel, and requested a second time that the court assign counsel for his defence. Thereupon the court appointed Peter S. Maher, Esq., and Clarence W. Rowley, Esq., counsel
36 for said Storti, and said Storti was notified of said appointment at said jail by the clerk of said court.

On the 25th day of said June said Storti was brought into said court from said jail and by his attorneys aforesaid filed a motion to quash said indictment, which motion, after a hearing before Honorable Daniel W. Bond, and Honorable Frederick Lawton, justices of said court, was overruled, and said Storti was set at the bar, and for trial put himself upon the country, and the Commonwealth did the like by its attorneys, Michael J. Sughrue, Esq., and John D. McLaughlin, Esq.

A jury was empanelled and sworn to try the issue, to wit, George R. Whittemore, foreman, and eleven of his fellows, namely, Timothy F. Callahan, John R. Maguire, John B. Kinney, Jacob Shillady, James B. Fuller, John H. West, Clayton O. Dewey, George F. Waldron, Samuel H. Irwin, Daniel V. Goodwin, and Alfred W. Tilton, who, after hearing and understanding all matters and things concerning the same, returned their verdict on the 1st day of July A. D. 1900, and on oath said that said Storti was guilty of murder in the first degree.

The court thereupon extended the time for the filing of exceptions by said Storti until on or before the 1st day of August A. D. 1900, and said Storti was remanded to said jail.

On the 25th day of said July, said Storti, by his attorneys, filed exceptions to the rulings of the presiding justices at said trial.

On the 10th day of November A. D. 1900 said exceptions, being examined and found conformable to the truth, were allowed and were ordered to be transmitted to the supreme judicial court.

On the 14th day of November A. D. 1900 the said Storti, by his attorneys, filed an appeal to said supreme court from the order of said superior court overruling said motion to quash.

On the 2d day of January A. D. 1901 a rescript is received from said supreme court in the words following: "Exceptions overruled."

On the 3rd day of said January a second rescript is received from said supreme court in the words following: "Rescript of Jan. 2, 1901, amended by adding thereto, Order overruling the motion to quash the indictment affirmed."

On the 4th day of said January the said Storti is brought into said court from said jail and is set at the bar to receive sentence.

It is therefore considered and ordered by said court that said Storti, for his offence of murder in the first degree, suffer the pun-

ishment of death by the passage of a current of electricity through his body, and that said sentence be executed upon said Storti within the week beginning on Sunday, the seventh day of April in 37 the year of our Lord one thousand nine hundred and one, in the manner prescribed by the laws of said Commonwealth, and that said Storti stand committed in pursuance of said sentence.

All of which appears of record in said superior court.

In testimony whereof, I hereunto set my hand and affix the seal of said superior court, at Boston, aforesaid, this eighth day of January in the year of our Lord one thousand nine hundred and one.

[SEAL.] JOHN P. MANNING, *Clerk.*

B.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of December, in the year of our Lord one thousand eight hundred and ninety-nine.

The jurors for the Commonwealth of Massachusetts, on their oath present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Buccilla, otherwise called Vincenzo Bucillo, of Boston, aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston, aforesaid, with force and arms, in and upon one Michele Calucci, feloniously, wilfully and of their malice aforethought did make an assault; and that the said Storti and Bocielli, with a certain axe, the said Calucci, in and upon the head of said Calucci, then and there feloniously, wilfully and of their malice aforethought, did strike, beat and bruise, giving to the said Calucci then and there, with the axe aforesaid, in and upon the head of said Calucci, divers mortal strokes, wounds and bruises, of which said mortal strokes, wounds and bruises the said Calucci on said seventh day of November, at Boston aforesaid, did languish and languishing did live, on which said seventh day of November, the said Calucci, at Boston, aforesaid, of the said mortal strokes, wounds and bruises, died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Luigi Storti and said Vincenzo Bocielli the said Michele Calucci in manner and form aforesaid then and there feloniously, wilfully and of their malice aforethought did kill and murder. And the jurors, aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present that Luigi Storti and Vincenzo Bocielli, otherwise called Vincenzo Bucilla, otherwise called Vincenzo Bucillo, did assault and beat Michele Calucci with intent to murder him, by striking him over the head with an axe, and by said assault and beating did kill and murder said Calucci.

38 And the jurors aforesaid do say, that both counts in this indictment are different descriptions of the same act.

A true bill.

JOHN H. McGEE,
Foreman of the Grand Jury.

JOHN D. McLAUGHLIN,
2d Ass't District Attorney.

C.

The Commonwealth of Massachusetts to all persons to whom these presents shall come, Greeting:

[L. S.] W. Murray Crane. Whereas, before our superior court begun and holden at the city of Boston within and for the county of Suffolk, on the first Monday of June, in the year of our Lord, one thousand nine hundred, Luigi Storti was convicted of the crime of murder in the first degree, and thereafter, to wit, on the fourth day of January in the year of our Lord, one thousand nine hundred and one, it was considered and ordered by said superior court that said Storti for his offence of murder in the first degree, suffer the punishment of death, by the passage of a current of electricity through his body, and that said sentence be executed upon said Storti within the week beginning on Sunday, the seventh day of April, in the year of our Lord, one thousand nine hundred and one, in the manner prescribed by the laws of said Commonwealth, which said sentence remains unexecuted.

And whereas, by section 36 of chapter 215 of our public statutes "The governor, by and with advice of the council, may respite from time to time, the execution of a sentence of death for stated periods so long as he may deem it necessary to afford him, by and with the advice aforesaid, an opportunity of exercising the constitutional right of pardon, and of investigating and considering the facts of the case for that purpose."

Now know ye, that by and with the advice of the council, the execution of said sentence of our superior court against said Luigi Storti is respited, the term of respite to expire on Saturday, the eleventh day of May next; of which all our judges, justices, magistrates, and officers of every denomination, especially the warden of our State prison, are to take notice.

Witness His Excellency, W. Murray Crane, our governor, with the advice and consent of our council, and our seal hereunto
39 affixed, at Boston, this ninth day of April, in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States of America, the one hundred and twenty-fifth.

By his excellency, the governor, with the advice of the council.

HERBERT H. BOYNTON,
Deputy Secretary of the Commonwealth.

Amendment of Petition.

And now comes Joseph Santosuosso, the petitioner in the above-entitled cause, and moves to amend his petition for a writ of *habeas corpus* heretofore filed, by adding, as additional grounds upon which the restraint and imprisonment of said Storti is unauthorized and illegal, as set forth in his petition heretofore filed, the following:—

Seventh. The provision in section 3 of chapter 326 of said acts of 1898, that execution shall be done within the week appointed by the court, "unless the governor pardons the offence, commutes the punishment therefor, or respites the execution as provided by law," deprives said prisoner of the rights guaranteed to him in article 1, section 9, clause 2, of the Constitution of the United States, and is in violation of said article, section, and clause, in that it deprives said prisoner of the right to be discharged on a writ of *habeas corpus*, even though the sentence imposed upon him is erroneous.

Eighth. The provision in section 3 of chapter 326 of said acts of 1898, that execution shall be done within the week appointed by the court "unless the Governor pardons the offence, commutes the punishment therefor, or respites the execution as provided by law," deprives said prisoner of the rights guaranteed to him in part 2, chapter 6, article 7, of the constitution of Massachusetts, and is in violation of said part, chapter, and article, in that it deprives said prisoner of the right to be discharged on a writ of *habeas corpus*, even though the sentence imposed upon him is erroneous.

By his attorney, W. M. STOCKBRIDGE.

Filed and allowed May 1, 1901.

Order of notice issued thereon April 30, 1901, returnable forthwith.

Further Amendment of Petition.

And now comes the petitioner in the above-entitled cause, and moves to further amend his petition for a writ of *habeas corpus*, heretofore filed, by adding, as an additional ground upon which the restraint and imprisonment of said Storti is unauthorized and illegal, as set forth in his petition heretofore filed, the following:—

Ninth. The provision in section 3 of chapter 326 of said acts of 1898, that execution shall be done within the week appointed by the court, "unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law," deprives said prisoner, he being a subject of His Majesty the King of Italy, of the rights guaranteed to him under the treaty now in force between the United States of America and His Majesty the King of Italy, and is in violation of said treaty, in that it deprives said prisoner of the right possessed by the natives of the United States, under the Constitution thereof, to have the benefit of a writ of *habeas corpus*,

even though the sentence imposed upon him shall be illegal and erroneous in any respect whatsoever.

By his attorney, W. M. STOCKBRIDGE.

Filed and allowed May 2, 1901.

Reservation.

This case came on to be heard upon the petition and amendment thereto; and thereupon, the attorney general contending that no issues of fact are raised thereby, I reserved the case and the questions of law arising upon the amended petition, and the facts therein stated, for the consideration and determination of the full court, in order that they may make such order thereon as in their opinion law and justice may require.

WILLIAM CALEB LORING, *J. S. J. C.*

May 4, 1901.

Copy.
Attest: JOHN NOBLE, *Clerk.*

41 "F."

HOLMES, *C. J.:*

These proceedings are respectively a writ of error and a petition for a writ of *habeas corpus*. Both are intended to raise the same issue, that the punishment, death by electricity, to which the said Storti has been sentenced, under St. 1898, c. 326, sec. 61, is "cruel or unusual" within art. 26 of the Massachusetts declaration of rights. Upon the writ of error, the plaintiff in error insisting that the assignment was of error in fact, evidence was heard, the plaintiff in error being brought into court by *habeas corpus* to be present at the hearing and the presiding justice found that the assignment as not true. The independent petition for *habeas corpus* was reserved by agreement of parties for hearing by the full court at the same time with the writ of error.

In the view which we take of the case it is unnecessary to consider any question of procedure, either as between the two proceedings adopted or as to matters of detail arising under each. We therefore pass all such matters on one side. It also is unnecessary to consider whether the before-mentioned article of our declaration of rights is to be limited in its application to the action of magistrates, so far as they are left to themselves and the common law, or whether it is to be taken to embody a large general principle equally binding upon all branches of the Government, or at least binding upon magistrates and courts of law even when the legislature has undertaken to establish a punishment by its act. Finally it is unnecessary to go into any nice argument upon the words of the article, and to decide whether inasmuch as those words are "cruel or unusual" not "cruel and unusual" a punishment which is unusual but is not cruel
42 is forbidden by them. Taking all the preliminaries most favorably for the prisoner, we are clearly of the opinion that

the constitution is not contravened by the act, and we render our opinion at once that we may avoid delaying the course of the law raising false hopes in his mind. The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true, the statute is invalid, but it is said that it is not true, and that you cannot separate the means from the end in considering what the punishment is, any more than when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death, but for the purpose of causing the other pain to the person concerned. The so-called means is also an end of the same kind as to the death itself, or in other words is intended to be a part of the punishment. But when, as here, the means adopted are chosen with just the contrary intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, we are of opinion that they are not forbidden by the constitution, although they should be discoveries of recent science and never should have been heard of before. Not only is the prohibition addressed to what in a proper sense may be called the punishment, but, further, the word "unusual" must be construed with the word "cruel" and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts.

People *ex rel.* Kemmler *v.* Durston, 119 N. Y. 569; S. C. *in re* Kemmler, 136 U. S. 436.

43 The suggestion that the punishment of death, in order not to be unusual, must be accomplished by molar rather than by molecular motion seems to us a fancy unwarranted by the constitution.

No doubt a means might be adopted which, although adopted only as a means, practically would be part of the punishment and would have to be considered as such, but such a case is not presented by a means chosen precisely because it is instantaneous. There was a hint at an argument based on mental suffering, but the suffering is due not to its being more horrible to be struck by lightning than to be hanged with the chance of slowly strangling, but to the general fear of death. The suffering due to that fear the law does not seek to spare. It means that it shall be felt.

Some criticism was addressed to minor details of the law. The provision that after delivery to the warden of the State prison the prisoner shall be kept in a special cell and only certain persons allowed access to him without an order of the court, does not prevent, and by its true construction is not intended to prevent, the presence of the prisoner in court in any matter which properly still may be brought up in court, and which by the course of law or treaty may require his presence,

See Commonwealth *v.* Cody, 165 Mass. 133, 138,

as was exemplified in this case.

Leaving it to the warden to select the day of the week appointed

by the court for the execution was not intended to aggravate the prisoner's distress, by enhancing his suspense. The purpose is human, and the possible uncertainty for a brief period as to the exact
44 time is not a part of the punishment.
See further Commonwealth *v.* Costley, 118 Mass. 1, 35.

Judgment to stand.
Writ of *habeas corpus* denied.

45 This cause entered as aforesaid came on to be heard and is fully heard by the court, the Honorable William L. Putnam, circuit judge, and the Honorable Francis C. Lowell, district judge, sitting, upon argument of counsel for the petitioner, the assistant attorney general for the Commonwealth of Massachusetts being present, and upon consideration thereof, it is ordered, adjudged and decreed that the petition herein be and the same is hereby dismissed for want of jurisdiction, without prejudice to an application to the courts of the State of Massachusetts.

46 And now, to wit, May 24, 1901, comes the petitioner and claims an appeal from the said order or decree of this court to the Supreme Court of the United States and said appeal is disallowed.

A true record.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

47 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause entitled, Luigi Storti, petitioner for writ of *habeas corpus*, No. 1122*a*, law docket, in said circuit court determined, and annexed hereto are attested copies of the assignment of errors and prayer for appeal and certificate on question of jurisdiction.

Seal of the Circuit Court, Massachusetts.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-fourth day of May, A. D. 1901.

ALEX. H. TROWBRIDGE, *Clerk.*

48 Circuit Court of the United States, District of Massachusetts.

In the Matter of LUIGI STORTI, Petitioner for a Writ of *Habeas Corpus.*

Petitioner's Assignment of Errors and Prayer for Appeal.

The petitioner being aggrieved by the judgment, rulings and findings of the United States circuit court for the district of Massachusetts in the above-entitled cause, hereby appeals from the said

judgment, rulings and findings therein named and makes the following assignment of errors, to wit:

That the circuit court of the United States for the district of Massachusetts in the above-entitled cause erred in refusing to issue a writ of *habeas corpus*, and in overruling and denying each of the following propositions and contentions of the petitioner:

I.

Neither chapter 326 of the Acts of 1898 of the Commonwealth of Massachusetts, under the authority and in accordance with the provisions of which the respondent Bridges proposes to inflict the death penalty upon your petitioner, nor any other law, statutory or otherwise of said Commonwealth, provides for any punishment for a person sentenced to death under said chapter 326, where the week appointed by the court for his execution has elapsed without execution having been done upon him, and without any lawful action by the governor, in the way of pardon, commutation or respite, as provided in section 3 of said chapter 326, and the respondent Bridges has no right or authority under the laws of said Commonwealth to hold the prisoner in any further restraint or to inflict the death penalty. Nevertheless, the said Bridges continues to hold your petitioner in restraint at the State prison aforesaid, for the purpose of causing execution to be done upon him by the infliction of the death penalty, contrary to the provisions of the first section of the 14th amendment to the Constitution of the United States, under which your petitioner sets forth and specially claims a right, title, privilege and immunity.

49

II.

Neither chapter 326 of the Acts of 1898 of the Commonwealth of Massachusetts, under the authority and in accordance with the provisions of which the respondent Bridges proposes to inflict the death penalty upon your petitioner, nor any other law, statutory or otherwise of said Commonwealth, provides for any punishment for a person sentenced to death under said chapter 326, where the week appointed by the court for his execution has elapsed without execution having been done upon him, and without any lawful action by the governor, in the way of pardon, commutation or respite, as provided in section 3 of said chapter 326, and the respondent, Bridges has no right or authority under the laws of said Commonwealth to hold the prisoner in any restraint or to inflict the death penalty. Nevertheless, the said Bridges continues to hold your petitioner in restraint at the State prison aforesaid, for the purpose of causing execution to be done upon him, by the infliction of the death penalty, contrary to the provisions of the first section of the 14th amendment to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America, and His Majesty, the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title and immunity

III.

Section 28 of chapter 214 of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and the superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, or on such terms, or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person, sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or in any court of Massachusetts, and the question as to the rights under the above-mentioned statute of a person sentenced to death as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for the Commonwealth of Massachusetts. The execution of said sentence within said year will deprive your petitioner of his right under said section 28 of chapter 214, of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted and will deprive your petitioner of his life, without due process of law, and will deny him the equal protection of the laws, contrary to the first section of the 14th amendment of the Constitution of the United States, under which your petitioner specially sets up and claims herein, a right, title, privilege and immunity.

IV.

Section 28 of chapter 214 of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and the superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, or on such terms or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your

petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or in any court of Massachusetts, and the question as to the rights under the above-mentioned statute of a person sentenced to death as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for the Commonwealth of Massachusetts. The execution of said sentence within said year will deprive your petitioner of his right under said section 28 of chapter 214, of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted and will deprive your petitioner of his life, without
52 due process of law and will deny him the equal protection of the laws, contrary to the first section of the 14th amendment to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America, and His Majesty, the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title, privilege and immunity.

V.

Section 28 of chapter 214, of the Public Statutes of Massachusetts, provides as follows:

"The supreme judicial court and superior court may, at the term at which the trial of an indictment is had, or within one year thereafter, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done or on such terms or conditions as the court may direct."

Under this statute, execution cannot lawfully be done upon a person sentenced to death within a year from the expiration of the term within which he was convicted, to wit, in the present case, before July 1, 1901. Nevertheless, the supreme judicial court for the Commonwealth of Massachusetts has confirmed the sentence of your petitioner by which the execution was fixed for a time within a year of the expiration of the term within which your petitioner was convicted. The question of your petitioner's rights as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, was not raised before the said supreme judicial court for the Commonwealth of Massachusetts, or any court of Massachusetts, and the question as to the rights under the above
53 mentioned statute of a person sentenced to death as to objecting to execution being done upon him within a year of the expiration of the term within which he was convicted, has never been raised and determined by the said supreme judicial court for

the Commonwealth of Massachusetts. The execution of said sentence within said year, will deprive your petitioner of his right under said section 28 of chapter 214 of the Public Statutes of Massachusetts, to move for a new trial within a year of the expiration of the term within which he was convicted, and of his right to be present at the decision on such motion, which right is guaranteed to him by article 23 of the treaty now in force between the United States of America and His Majesty, the King of Italy, to wit:

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have full opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

Feb. 26, 1871.

Nov. 23, 1871.

Your petitioner specially sets up and claims herein, a right, title, privilege and immunity in the above respect, under said treaty.

VI.

Under the law of Massachusetts, pending the motion for a new trial, above referred to, which was filed by your petitioner May 10, 1901, execution cannot lawfully be done upon your petitioner by the infliction of the death penalty. Nevertheless your petitioner apprehends, with reason, that notwithstanding the pendency of said motion for a new trial, and before your petitioner can have a fair opportunity to be heard on said motion and to be present at the decision of said motion, the respondent intends, immediately upon the determination of the appeal above referred to, now pending in the Supreme Court of the United States, in case the decision on said appeal shall be adverse to your petitioner, to forthwith cause execution to be done upon your petitioner and to thereby deprive him of his rights under the first section of the 14th amendment to the Constitution of the United States and under the said article 23 of the treaty between the United States of America, and His Majesty, the King of Italy, under which amendment and which treaty your petitioner specially sets — and claims herein a right, title, privilege and immunity.

54

VII.

The respondent, Bridges, as warden of the State prison, derives his authority to hold your petitioner in custody solely by virtue of, and only in strict accordance with, the provisions of said chapter 326 of the Acts of 1898, and neither he nor his predecessors in office, prior to the passage of said chapter 326 of the Acts of 1898, ever have had authority to hold in custody a person convicted of the crime of murder in the first degree. No authority is given to the said respondent, as warden of the State prison aforesaid, or in any capacity

to retain the custody of your petitioner after the expiration of the week appointed by the court, within which sentence shall be executed, except through the lawful action of the governor as set forth in section 3 of said chapter 326. The week appointed by the court, within which sentence shall be executed upon your petitioner, has expired, and no lawful action has been taken by the governor,
55 in the way of pardoning the offense, commuting the punishment therefor, or respiting the execution, and said respondent, as said warden, has now no authority of law to retain the custody of your petitioner. Nevertheless, said respondent, Bridges, continues to hold your petitioner in restraint, at the State prison aforesaid, and is depriving your petitioner of his liberty, without due process of law, and is denying to your petitioner the equal protection of the laws contrary to the provisions of section 1 of article 14 of the amendments to the Constitution of the United States, under which your petitioner sets up and specially claims herein a right, title, privilege and immunity.

VIII.

The respondent, Bridges, as warden of the State prison, derives his authority to hold your petitioner in custody solely by virtue of, and only in strict accordance with, the provisions of said chapter 326 of the Acts of 1898, and neither he nor his predecessors in office, prior to the passage of said chapter 326 of the Acts of 1898, ever have had authority to hold in custody a person convicted of the crime of murder in the first degree. No authority is given to the said respondent, as warden of the State prison aforesaid, or in any capacity, to retain the custody of your petitioner after the expiration of the week appointed by the court, within which sentence shall be executed, except through the lawful action of the governor, as set forth in section 3, of said chapter 326. The week appointed by the court, within which sentence shall be executed upon your petitioner, has expired, and no lawful action has been taken by the governor, in the way of pardoning the offense, commuting the punishment therefor, or respiting the execution, and said respondent, as said warden, has now no authority of law to retain the custody of your petitioner. Nevertheless, said respondent, Bridges, continues to hold your petitioner in restraint,
56 at the State prison aforesaid, and is depriving your petitioner of his liberty, without due process of law, and is denying to your petitioner the equal protection of the laws, contrary to the provisions of section 1 of article 14 of the amendments to the Constitution of the United States, and contrary to the third article of the now existing treaty between the United States of America, and His Majesty, the King of Italy, and contrary to section second of article six of the Constitution of the United States, under which amendment, treaty and section your petitioner specially sets up and claims herein a right, title, privilege and immunity.

IX.

The court also erred in ruling that it had no jurisdiction of the cause

And for the failure of the court to find in the manner prescribed, and for other reasons, your petitioner prays that the decision of the United States circuit court for the district of Massachusetts may be reversed, and that a judgment may be ordered that a writ of *habeas corpus* shall issue to bring your petitioner before the said court, and that he be discharged upon such writ. That thereupon your petitioner appeals to the Supreme Court of the United States from the decision and findings of the said circuit court and prays that this, his appeal, may be allowed.

By his attorneys, WM. M. STOCKBRIDGE,
G. PHILIP WARDNER,
Of Counsel for Petitioner.

A true copy:

[Seal of the Circuit Court, Massachusetts.]

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

57 Circuit Court of the United States, District of Massachusetts.

In the Matter of LUIGI STORTI.

Certificate.

We, the undersigned, certify that the above matter was presented before us for determination on the twenty-fourth day of May, 1901, and was argued by counsel, that the question of the jurisdiction of this court was in issue, and was considered by us, and our decision dismissing the petition was on the ground of want of jurisdiction.

Judge Lowell is now absent.

W. L. PUTNAM,
Circuit Judge.

May 24, 1901.

Ordered that the above be entered of record.

Attest: BENJ. H. BRADLEE,
Deputy Clerk.

A true copy:

[Seal of the Circuit Court, Massachusetts.]

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

And now, to wit, June 21, 1901, comes the petitioner & claims an appeal from the said order or decree of said United States circuit court for the district of Massachusetts to the Supreme Court of the United States & said appeal is allowed.

HORACE GRAY,
Justice Sup. Ct. U. S.

58 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

United States Circuit Court of Appeals for the First Circuit.

The President of the United States to the Commonwealth of Massachusetts & Benjamin F. Bridges, the warden of the State prison at Boston, in the county of Suffolk, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., on the* nineteenth day of July next, pursuant to an appeal duly obtained from a decree of the† circuit court of the United States for the district of Massachusetts wherein Luigi Storti, a subject of the King of Italy & a citizen of the Kingdom of Italy is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace Gray, justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand nine hundred and one.

HORACE GRAY,
Justice Sup. Ct. U. S.

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*Not exceeding 30 days from the day of signing.
†Name of court in which the decree is entered.

59 [Endorsed:] No. —. Law. Luigi Storti, petitioner for writ of *habeas corpus.* Citation on appeal & acknowledgment of service thereon.

BOSTON, *June* 21, 1901.

Service of the within citation is hereby accepted for the Commonwealth of Massachusetts and Benjamin F. Bridges, warden, by—

ARTHUR W. DE GOOSLE,
Assistant Attorney General of Massachusetts.

60 (*Bond to Party on Appeal.*)

Know all men by these presents, that we, Luigi Storti, commorant of Boston, Massachusetts, as principal, and Joseph Santosuosso of said Boston, as surety, are held and firmly bound unto the Commonwealth of Massachusetts & Benjamin F. Bridges, warden of the State prison at Boston in said Massachusetts, in the full and just sum of two hundred dollars to be paid to the said Commonwealth & the said Bridges to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the twenty-first day of June in the year of our Lord one thousand nine hundred and one.

Whereas lately at a circuit court of the United States for the district of Massachusetts in a petition depending in said court in which the said Luigi Storti is petitioner for a writ of *habeas corpus* a decree was entered against the said Storti and the said Storti having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the said decree and a citation directed to the said Commonwealth of Massachusetts & to Benjamin F. Bridges, warden of the State prison at Boston aforesaid citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the nineteenth day of July next.

Now the condition of the above obligation is such, that if the said Storti shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his appeal good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

LUIGI STORTI, [L. S.]
By his attorney, G. PHILIP WARDNER.
JOSEPH SANTOSUOSSO. [L. S.]

Signed, sealed and delivered in presence of

——— ———.

Approved:

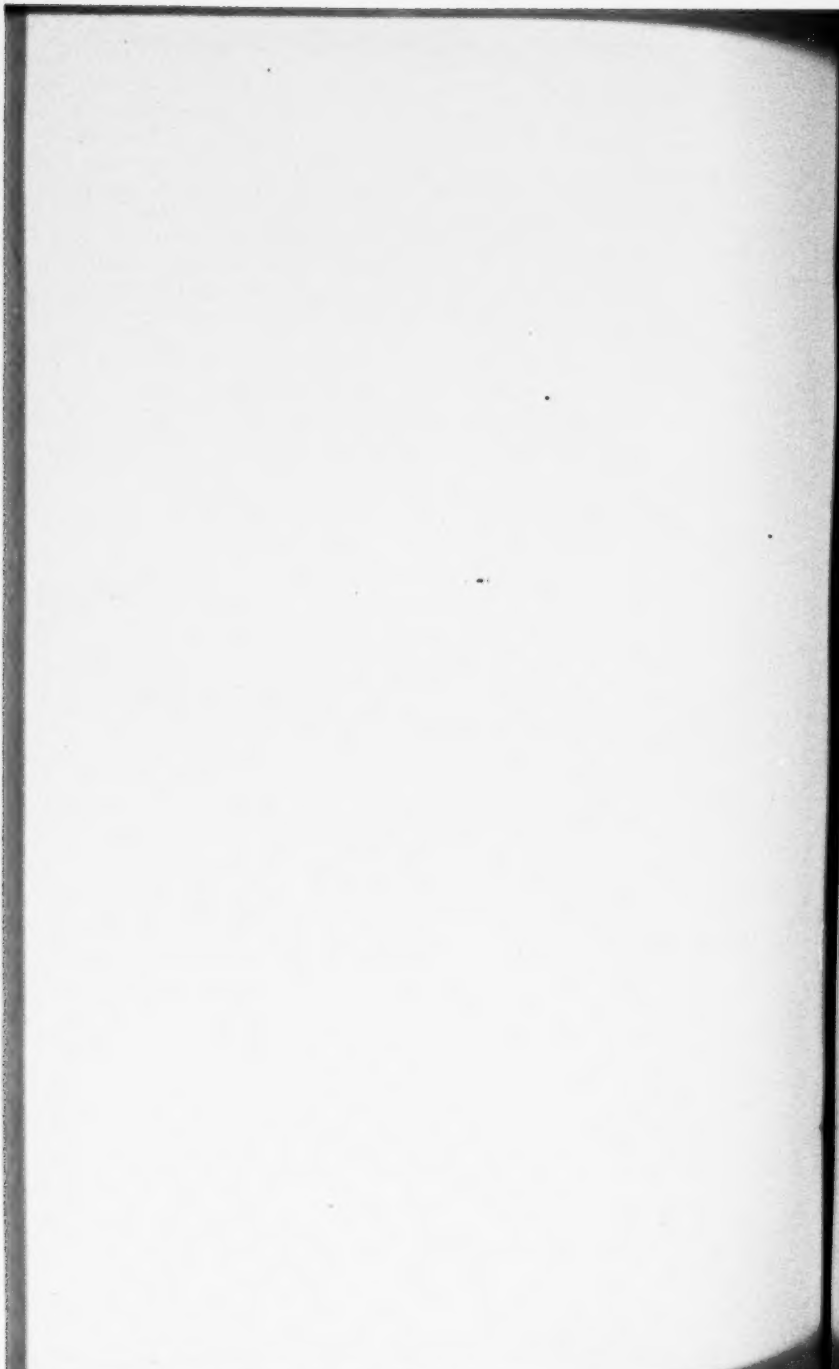
HORACE GRAY,
Justice Sup. Ct. U. S.

A true copy:

[Seal of the Circuit Court, Massachusetts.]

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 18,231. Massachusetts C. C. U. S. Term No. 378. Luigi Storti, appellant, *vs.* The Commonwealth of Massachusetts & Benjamin F. Bridges warden of the State prison at Boston, Massachusetts. Filed July 19th, 1901.



No. 378.

FILED
NOV 9 1901
JAMES H. McKENNEY,
CLERK

Brf. of Stockbridge & Wardner for Appellant

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Filed Nov. 9, 1901.

No. 378.

LUIGI STORTI, APPELLANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS AND BENJAMIN F. BRIDGES, WARDEN OF THE STATE PRISON AT BOSTON, MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANT.

WILLIAM M. STOCKBRIDGE,
G. PHILIP WARDNER,
Counsel for Appellant.

Supreme Court of the United States.

No. 378. October Term, 1901.

LUIGI STORTI, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS and BENJAMIN F. BRIDGES, Warden of the State Prison, at Boston, Massachusetts.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order or decree of the United States Circuit Court for the District of Massachusetts, entered May 24, 1901, dismissing, for want of jurisdiction, a petition for a writ of habeas corpus. The appeal was on May 24, 1901, claimed and disallowed by said court, but was on June 21, 1901, allowed by Mr. Justice Gray of this court. (Record, pp. 30, 36.)

The appeal comes from said Circuit Court to this court by virtue of that provision of section 5 of the Act of March 3, 1891, which authorizes appeals "in any case in which the jurisdiction of the court is in issue."

26 Stats. at L., chap. 517, sect. 5.

The certificate, required by the above act in cases where the jurisdiction of the court is in issue, was made and appears as a part of the record. (Record, p. 36.)

The material facts are as follows: —

On January 4, 1901, the appellant, having been convicted in

the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts, on the last day of its term, to wit, July 1, 1900, of the crime of murder, committed November 7, 1899, was sentenced by said Superior Court to be executed under chapter 326 of the Massachusetts Acts of 1898, the time fixed for the execution being the week beginning April 7, 1901. April 9, 1901, a respite was issued by the governor under Mass. Pub. Stats., chap. 214, sect. 36, which expired May 11, 1901, and, as appears in the petition, "there has been no further lawful pardon, commutation, or respite of sentence by the governor." On April 30, 1901, the appellant filed in the Supreme Judicial Court of Massachusetts a petition for a writ of error to the trial court, and a petition for a writ of habeas corpus, which, on May 7, 1901, were both decided adversely to the appellant, as appears by the opinion of said court, which is made a part of the present record. (Record, p. 28.)

None of the questions involved in the present petition were raised in the last mentioned petitions.

On May 10, 1901, the appellant presented to the United States Circuit Court for the District of Massachusetts a petition for a writ of habeas corpus, which, on May 11, 1901, was on hearing dismissed, and the appellant forthwith took an appeal to this court, which was duly perfected and docketed on May 18, 1901, and appears on the docket of this court as No. 325, but which, in accordance with the agreement of the parties now on file, is to be dismissed when reached for argument. None of the grounds relied upon in the last mentioned petition, to establish the alleged illegal imprisonment, appears in the present petition except one, namely, an illegality in such imprisonment growing out of an alleged violation of treaty rights between this country and Italy.

On May 10, 1901, the appellant also filed in said Superior Court a motion for a new trial under Mass. Pub. Stats., chap. 214, sect. 28, which was assigned for hearing on May 11, 1901, but, by reason of the pendency of the foregoing appeal in said No. 325, was not then heard, and is still pending and undetermined.

The statutes which the appellant deems necessary for consideration are as follows: —

Mass. Stats. of 1898, chap. 326:

"SECT. 1. In pronouncing sentence of death upon a person convicted of a capital crime the court shall appoint a week within which such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence, and shall immediately thereafter make out, sign and deliver to the sheriff of the county a warrant, under the seal of the court, stating the conviction and sentence, and the week appointed for the execution thereof, and shall at the same time transmit to the warden of the state prison a certified copy of the warrant. Such warrant shall be directed to the warden of the state prison, commanding the warden to cause execution to be done in accordance with the provisions of such sentence, upon some day within the week thus appointed.

"SECT. 2. When a person is sentenced to the punishment of death he shall be confined in a jail or prison in the county in which such sentence is pronounced until within ten days of the first day of the week appointed for the execution of the sentence. He shall, within such ten days, and at a time chosen by the sheriff of the county, be conveyed as secretly as may be, by the sheriff or such deputy as he may name, to the state prison, where the sentence is to be executed, and be delivered, together with the warrant, to the warden or the officer performing the duties of warden. From the time of such delivery until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the convict under sentence shall be kept in a cell provided for the purpose, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

"SECT. 3. The sentence of death shall be executed by the warden of the state prison, or by a person or persons acting under the direction of the warden. Unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law, the execution shall be done within the week appointed by the court; and in case the execution is respited the sentence shall be executed within the week beginning on the day next after the day on which the term of respite expires. The execution shall be done upon such day as the warden shall select within the week determined as aforesaid, and at an hour between midnight and sunrise; but no previous announcement shall be made, except to the persons

who shall be permitted to be present at such execution, as hereinafter provided.

"SECT. 6. The punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

"SECT. 7. When a warden inflicts the punishment of death upon a convict in obedience to a warrant from the court he shall, as soon as may be, make return thereof under his hand, with the doings thereon, to the office of the clerk of said court.

"SECT. 11. Sections thirty-two, thirty-three, thirty-seven, thirty-eight and thirty-nine of chapter two hundred and fifteen of the Public Statutes are hereby repealed.

"SECT. 12. This act shall take effect upon its passage."

Approved April 13, 1898.

Mass. Pub. Stats., chap. 215:

"SECT. 32. In pronouncing sentence of death upon a person convicted of a capital crime, the court shall appoint the time when such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence; and shall immediately thereafter make out and deliver to the sheriff of the county where the conviction was had a warrant under the seal of the court, commanding the sheriff to cause execution to be done in accordance with the provisions of the sentence; and to this warrant there shall be annexed a certified copy of the whole record of the conviction and sentence, and an affidavit of the delivery to the governor of a certified copy of the record required to be delivered as aforesaid.

"SECT. 33. The sheriff shall thereupon cause execution to be done at the time appointed, unless the governor, by and with the advice of the council, pardons the offence, commutes the punishment therefor, or respites the execution of the sentence as hereinafter authorized. In case the execution is respited, the sentence shall be executed on the day next after the day on which the term of respite expires, unless the day next after the day aforesaid is a Sunday or legal holiday; in which case the sentence shall be executed on the first day thereafter which is not a Sunday or legal holiday. In case the sentence is not executed on the day finally appointed, the sheriff shall cause execution to be done as soon as may be after the said day finally appointed.

"SECT. 36. The governor, by and with the advice of the council, may respite from time to time the execution of a sentence of death for stated periods so long as he may deem it necessary to afford him, by and with the advice aforesaid, an opportunity

of exercising the constitutional right of pardon, and of investigating and considering the facts of the case for that purpose."

Mass. Pub. Stats., chap. 214, sect. 28:

"The supreme judicial court and superior court may at the term in which the trial of an indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on such terms or conditions as the court shall direct."

Extracts from the existing treaty between the United States of America and his Majesty the King of Italy:

"ARTICLE III.

"The citizens of each of the high contracting parties shall receive, in the state and territories of the other, the most constant protection and security for their person and property, and shall enjoy in this respect the same right and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Art. 23, printed at Record, p. 6.

Nine assignments of error are set forth (Record, pp. 30–36). But the sole question involved in the case is whether the Circuit Court erred in ruling that it had no jurisdiction of the cause, as averred in the ninth assignment of error. (Record, p. 36.)

The questions involved in the other assignments are material so far, but only so far, as they affect the question of jurisdiction. They involve, briefly stated, the following questions:

FIRST ASSIGNMENT.

Whether the present restraint of the appellant by the warden of the state prison, for the purpose of inflicting the death penalty, notwithstanding the failure of the laws of the Commonwealth of Massachusetts, legislative or otherwise, to furnish authority for holding the appellant in custody and inflicting the death penalty, where the week fixed for the execution has elapsed without execution having been done, and no lawful

pardon, commutation, or respite has been made, is a denial of the rights given to the appellant by the first section of the Fourteenth Amendment of the Constitution of the United States.

Second Assignment.

Whether such restraint under the last mentioned circumstances is a denial of the rights given to the appellant by the first section of the said Fourteenth Amendment or by the third article of the Italian treaty.

Third Assignment.

Whether, in view of the averment that under Mass. Pub. Stats., chap. 214, sect. 28, a capital sentence cannot lawfully be inflicted within a year from the expiration of the term within which a criminal was convicted, the execution of the sentence imposed upon the appellant, in that if carried out it would deprive him of his right to move for a new trial within such year, would be a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment of the Constitution of the United States.

Fourth Assignment.

Whether the execution of said sentence, in view of the last mentioned averments, would be a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment or by the third article of the Italian treaty.

Fifth Assignment.

Whether, in view of the last mentioned averments, the execution of said sentence, in that it would deprive the appellant of his right to be present at a decision on a motion for a new trial, would be a denial of any rights guaranteed to him by article 23 of said Italian treaty.

Sixth Assignment.

Whether the reasonable apprehension of the appellant that the respondent Bridges, as warden of the state prison, intends to inflict the death penalty before the appellant can be heard

upon his pending motion for a new trial, is a denial of any of the appellant's rights, under the first section of the Fourteenth Amendment of the Constitution of the United States or under article 23 of the Italian treaty.

SEVENTH ASSIGNMENT.

Whether the continued holding of the appellant in restraint, notwithstanding the lack of authority on the part of the warden of the state prison, and the failure of the legislature to furnish authority, to hold the appellant in custody after the expiration of the week appointed for execution, and in the absence of any lawful pardon, commutation, or respite, is a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment of the Constitution of the United States.

EIGHTH ASSIGNMENT.

Whether such continued holding of the appellant is a denial of any of the rights given to him by said first section of the Fourteenth Amendment or by the third article of the Italian treaty.

ARGUMENT.

I.

THE SOLE QUESTION FOR DETERMINATION IS WHETHER THE CIRCUIT COURT HAD JURISDICTION TO ENTERTAIN THE PETITION.

Section 5 of the Act of March 3, 1891, contains three provisions, any one of which would have furnished sufficient authority for an appeal to this court from an adverse decision of the Circuit Court on the present petition. The provisions referred to are those authorizing an appeal (1) "in any case in which the jurisdiction of the court is in issue," and (2) "in any case that involves the construction or application of the Constitution of the United States," and (3) "in any case in which . . . the validity or construction of any treaty made under its authority is drawn in question."

26 Stats., chap. 517, sect. 5.

If the lower court had dismissed the petition on any ground other than want of jurisdiction this court would have acquired jurisdiction of the entire case, and could have considered whether, on grounds of discretion or on any grounds affecting the merits of the controversy, the writ should or should not have issued, and need not have confined itself to the single federal question which was the basis of the appeal.

Horner *v.* United States, 143 U.S. 570, 576, 577.

The ability of the court to take jurisdiction of the entire case was said in Horner *v.* United States, *supra*, to arise from the fact that a certificate was required by the Act in cases where the jurisdiction of the court was in issue, but was not required in the other cases mentioned in section 5, and that, in consequence, the legislature could not have intended, in cases where the jurisdiction of the court was not in issue, to confine the Appellate Court to a determination of the federal question or questions which were made the bases of the appeal. From the above reasoning the inference is overwhelming that where, as in the present case, the jurisdiction of the court is in issue and the question of jurisdiction has been certified to this Court, no other question is open for consideration.

So, also, it was held that, even where the jurisdiction of the lower court was in issue, the absence of a certificate enabled the court to dispose of "the entire case, including all questions, whether of jurisdiction or of merits."

Chappell *v.* United States, 160 U.S. 499, 509.

In Press Publishing Co. *v.* Munroe, 164 U.S. 105, 110, Mr. Justice Gray says:

"From final judgments of the Circuit Court in civil suits an appeal or writ of error lies to this court or to the Circuit Court of Appeals. It lies direct to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction *only* is certified to *and decided by this court*."

Where a case has been dismissed in the Circuit Court for want of jurisdiction, and the certificate required by section 5 in such cases had been made, this court refused to consider anything but the question of jurisdiction; and, being satisfied that the lower court had erred in dismissing the case for want of jurisdiction, remanded the cause for further proceedings, although it was apparent that the action could not be maintained on the merits because it was already *res adjudicata*, which question the court below had treated as a question of jurisdiction.

Huntington *v.* Laidley, 176 U.S. 668.

The requirement as to a certificate is satisfied by "a plain declaration that the single matter which is by the record sent up to this court is a question of jurisdiction."

Shields *v.* Coleman, 157 U.S. 168, 176.

II.

THE CIRCUIT COURT HAS JURISDICTION UNDER THE REVISED STATUTES OF A PETITION FOR HABEAS CORPUS BY A PRISONER IN JAIL WHERE IT IS DEDUCIBLE FROM THE RECORD THAT IT IS DRAWN IN QUESTION OR CLAIMED THAT SUCH IMPRISONMENT IS IN VIOLATION OF THE CONSTITUTION OR A LAW OR TREATY OF THE UNITED STATES.

The learned judge of the court below, in dismissing the case for want of jurisdiction, uses the following language:

"Now, this petition is very general in its allegations. It isn't enough, in order to require this court to issue a writ of habeas corpus, that the petition alleges that the prisoner is held in violation of the Constitution of the United States, or of a treaty with a foreign nation, as was said in King's case (64 Fed. Rep. 331). . . . In the present case the allegations of the petition are not very full in this particular, but still they are sufficient, together with the exhibits annexed to the petition, to enable us to determine whether or not there is anything in the petition which brings the case within the section of the Revised Statutes from which we have read (sect. 753); that is, whether or not there is enough to support the allegation that the petitioner is in

custody in violation of the Constitution or of a law or treaty of the United States. Admitting that he is in jail, and in jail under some authority of somebody representing the state of Massachusetts, we cannot issue the writ unless we find, on the face of the petition, something which meets the express provision of the section which we have read. That question lies at the very threshold of our proceeding. It is a settled rule that a federal court must take cognizance of the question of jurisdiction; and where it is clear that it has no jurisdiction it must dismiss the case, even if the suggestion is not made by the parties concerned."

Re Storti, 109 Fed. Rep. 807, 808.

From the above language it is apparent that the learned judge, in dismissing the petition for want of jurisdiction, was of the opinion that unless the petition showed so conclusively a custody in violation of the Constitution or a law or a treaty of the United States as would require him, on proof of the facts alleged after the issue of and return to a writ of habeas corpus, to discharge the prisoner, he could not take jurisdiction of the cause. It is the contention of the appellant that jurisdiction depends not on the determination by inspection of the petition that the petitioner is, as a matter of law and fact, in custody in violation of the Constitution or a law or treaty of the United States, but on the determination by such inspection that a colorable, not necessarily a well founded, claim is made that he is so in custody; in other words, that the court has jurisdiction to determine whether the writ shall issue, that is, has jurisdiction of the cause, if it is distinctly deducible from the record that a definite issue is presented to the court as to whether the petitioner is in custody in violation of the Constitution or a law or treaty of the United States, regardless of the decision of the court on such issue.

It is elementary that the question of jurisdiction is entirely distinct from a determination of the cause upon its merits.

Nashville, etc., R. Co. *v.* Taylor, 86 Fed. Rep. 168, 178, and cases cited.

And it is further submitted that the learned judge failed to recognize the above distinction.

The correctness of the appellant's contention can be seen:

(1) By an examination of the statutes conferring upon federal courts jurisdiction to issue writs of habeas corpus.

(2) From the language of and construction placed upon analogous statutes.

(3) From the mischievous results of a different contention.

(4) From a consideration of the procedure sanctioned and recommended by this court in dealing with applications for writs of habeas corpus.

1. The earliest statute conferring habeas corpus jurisdiction is the fourteenth section of the judiciary act of 1789 (1 Stats. 81, chap. 20). This gave the federal courts jurisdiction "in all cases to which the judicial power of the United States extends other than those expressly excepted from it."

Ex parte Yerger, 8 Wall. 85, 101.

The cases so excepted were those of prisoners in jail "unless where they are in custody under *or by color of* the authority of the United States."

Under this statute the court, though entertaining a doubt, "in favor of liberty, was willing to grant the habeas corpus."

Ex parte Burford, 3 Cranch, 448.

The next statute was the Act of March 2, 1833 (4 Stats. 632, chap. 57), section 7 of which extended the jurisdiction over a prisoner or prisoners in jail "where he or they shall be committed or confined, on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof."

Next, the Act of August 29, 1842 (5 Stats. 539, chap. 257), still further extended the jurisdiction over prisoners in jail "where he, she, or they, being subjects or citizens of a foreign state and domiciled therein, shall be committed or confined or in custody under or by any authority of law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any *alleged* right, title,

authority, privilege, protection, or exemption, *set up or claimed* under the commission, or order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations *or under color thereof*."

Finally, the Act of February 5, 1867 (14 Stats., 385, chap. 21), broadly extended the jurisdiction of the federal courts over prisoners in jail "in all cases where any person *may be* (not "is") restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."

The provisions of the foregoing statutes were consolidated and appear in Rev. Stats., chap. 13, sects. 751–766.

It was not the intention in so consolidating the statutes to alter in any respect the previously existing jurisdiction. (See Report of Commissioners on Revision, v. 1, sect. 218, note.) And it has been determined that section 753 of the Revised Statutes in providing that the writ of habeas corpus would in no case be extended to a prisoner in jail, "unless . . . he . . . is in custody in violation of the Constitution or of a law or treaty of the United States," has by necessary implication affirmatively enacted that the writ shall issue, even in the case of a prisoner in jail, if he is in custody in violation of the Constitution or of a law or treaty of the United States.

Ex parte Royall, 117 U.S. 241, 247.
In re Neagle, 135 U.S. 1, 40, 41, 70.
In re Burrus, 136 U.S. 586, 591.

In fact, the Act of February 5, 1867, was in the affirmative form.

In two of the statutes, fourteenth section of the judiciary act and the Act of August 29, 1842, jurisdiction is clearly dependent not on the fact, in the one, that the prisoner is in custody under the authority of the United States, or on the fact, in the other, that his "right, title, authority, privilege, protection, or exemption" are well founded, either in fact or in law, but upon the circumstance that a *claim* appears to be made that he is so in custody. The language used by the commissioners and adopted by Congress in the revision, and contained in that part of section

753 which furnishes the authority for jurisdiction in the present case, is different from the Act of February 5, 1867, by which jurisdiction in cases of persons imprisoned in violation of the Constitution or of a law or treaty of the United States is established; but, as above shown, there was no intention to alter in section 753 the previously established jurisdiction, so that the words in section 753 "is in custody in violation of the Constitution or of a law or treaty of the United States" must be construed as if they read "*may be* in custody, etc." Such construction, and it is submitted to be the necessary construction, substantiates the appellant's contention that the existence of a claim, not its validity in law or fact, determines jurisdiction, and brings the prerequisites of jurisdiction, as given by the Act of February 5, 1867, in harmony with all the prior statutes, excepting possibly the Act of March 2, 1833.

It is significant, and further confirmatory of the appellant's contention, that in no case has this court held or declared that any different considerations prevailed, with reference to the assertion on the one hand or the establishment on the other of the claim of unlawful imprisonment in the Acts of March 2, 1833, and February 5, 1867, than prevailed by express language in the fourteenth section of the judiciary act and in the Act of August 29, 1842.

None of the statutes passed since the adoption of the Revised Statutes, relating specifically to the jurisdiction of the circuit courts and involving money values as a condition of such jurisdiction, including the Act of March 3, 1875, chap. 137 (18 Stats. 470), and that of March 3, 1887, as re-enacted by the Act of August 13, 1888, chap. 866 (25 Stats. 433), has taken from said courts their jurisdiction to issue writs of habeas corpus under section 753, in the case of a prisoner in jail, where he is in custody in violation of the Constitution or a law or treaty of the United States.

United States *v.* Mooney, 116 U.S. 104.
In re Hohorst, 150 U.S. 653.
King *v.* McLean Asylum, 64 Fed. Rep. 331.
(C. C. A. First Circuit, 1894.)

2. The above contention is further strengthened by the consideration of the language and the construction placed thereon of analogous statutes.

It has been uniformly held under Revised Statutes, section 709, that this court has jurisdiction of an appeal from or writ of error to the highest court of a state, the judgment or decree of which is contended to have been against the validity of a treaty or statute of or an authority exercised under the United States; or to have been in favor of the validity of a statute of or authority exercised under a state challenged for repugnancy to the Constitution, laws, or treaties of the United States; or to have been against a right, title, privilege, or immunity claimed under the Constitution, or any treaty, statute of, commission held, or authority exercised under the United States, *if it appears that the right was specifically set up and claimed* in the state court and was denied, or that that was in law the necessary effect of the decree or judgment.

This court furthermore, in such cases, has repeatedly sustained its jurisdiction, when that question has been raised by motion to dismiss or otherwise, and has nevertheless affirmed the decision of the state court, showing conclusively the distinction between the question of jurisdiction and the determination of the cause upon its merits.

In Insurance Co. *v.* Needles, 113 U.S. 574, 579, Mr. Justice Harlan said:

"And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must therefore be denied."

See also

Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245.
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 143.
Lehigh Water Co. *v.* Easton, 121 U.S. 388, 389.
Kaukanna Co. *v.* Green Bay, etc., Canal, 142 U.S. 254, 262, 271.
Roby *v.* Colehour, 146 U.S. 153.
C. B. & Q. R. Co. *v.* Haber, 169 U. S. 613, 622.

It is true that the language of section 709 is perhaps more favorable to the contention here advanced than the language of section 753, section 709 providing that the decision of the state court may be re-examined by this court where *is drawn in question* the validity of a treaty, etc., of the United States, or where any title, etc., *is claimed*, etc., under the Constitution, etc.

But the decisions show clearly that the principles governing cases arising under section 709 do not necessarily turn on its specific language. Moreover, while the language of section 709 is broad enough to cover any case, however flimsy, nevertheless this court has held that it had no jurisdiction under section 709 if the claim was fraudulent or frivolous.

Millingar *v.* Hartupee, 6 Wall. 258.
New Orleans *v.* New Orleans Waterworks Co., 142 U.S. 79, 87.
Hamblin *v.* Land Co., 147 U.S. 531.

It would seem no more difficult to read into section 753, the language of which, as set forth in the section, swings perhaps to an extreme in the other direction, the qualification that the court would have jurisdiction of any petition for habeas corpus by a prisoner in jail, where it was drawn in question, or claimed that his custody was in violation of the Constitution or of a law or treaty of the United States, there being, of course, the same qualification as to fraudulent or frivolous claims.

The decisions of this court under section 5 of the Court of Appeals Act (Act of March 3, 1891, chap. 517, 26 Stats. 826) are perhaps even more apposite.

It is provided by said section "that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases. . . .

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

"In any case in which the constitution or law of a state is claimed to be in contravention of the United States."

Thus, in the case of an appeal from the Circuit Court for the Northern District of Illinois to this court under the first of the above-quoted clauses of said section 5, it was said by Mr. Justice Gray:

"In order to bring a case within this clause of the act, the Circuit Court must have construed the Constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for."

Cornell *v.* Green, 163 U.S. 75, 78.

In a dissenting opinion in the same case, Mr. Justice Brown said, at page 86:

"The bill averred broadly that he was not made a party at all, but the court, putting its own construction upon the foreclosure proceedings, which were made an exhibit to the original bill, decided that he was. Whether he was bound individually by the proceedings against him in his representative capacity — in other words, whether he individually was a party defendant to the bill — is beside the question. It is sufficient that he is averred not to have been, that a construction of the Constitution was necessarily involved, and that the position of the plaintiff in that connection is not a frivolous one or wholly destitute of foundation."

See also

Tennessee *v.* Union & Planters Bank, 152 U.S. 454, 458.
Ansbro *v.* U. S., 159 U.S. 695.
Insurance Co. *v.* Austin, 168 U.S. 165.

A similar doctrine has been laid down in determining whether circuit courts have jurisdiction of suits originally brought therein or removed thereto from state courts, on the ground that the proceedings were suits of a civil nature, at law or in equity, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," as provided in the Act of March 3, 1875, chap. 137 (18 Stats. 470), and the Act of March 3, 1887, chap. 373 (24 Stats. 552), as corrected by the Act of August 13, 1888 (25 Stats. 434).

Thus, it was said by Mr. Justice Gray in Tennessee *v.* Union & Planters Bank, 152 U.S. 454, at page 459, that "under section 1 of that act (March 3, 1875), providing that those courts (circuit courts) should have original cognizance of such suits, when the matter in dispute exceeded the sum or value of five hundred dollars, their jurisdiction was exercised in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the Constitution or laws of the United States."

The learned justice further said that under section 2 of the Act of 1875 a case might be removed from a state to a federal court as one arising under the Constitution, laws, or treaties of the United States, if the record at the time of the removal showed that either party *claimed* a right under the Constitution or laws of the United States.

See also cases cited at pp. 459 and 460.

In City R. Co. *v.* Citizens St. R. Co., 166 U.S. 557, in which the question was raised in the pleadings as to whether the Citizens Railroad Company had a valid contract with the city of Indianapolis, which was impaired by a subsequent contract with the City Railway Company, Mr. Justice Brown, delivering the opinion of the court, said: "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

See also

Spencer *v.* Merchant, 125 U.S. 345.
Hamilton Gas Light & Coke Co. *v.* Hamilton City, 146 U.S. 258.
Cooke *v.* Avery, 147 U.S. 384.
Hanford *v.* Davis, 163 U.S. 273.

The appellant's contention may be summed up in the language of Judge Clark in the case of Nashville, etc., R. Co. *v.* Taylor, 86 Fed. Rep. 168 (Circuit Court for the Middle District of Tennessee, 1898), at p. 178, where it is said:

"It will be well, before dealing more closely with the question of jurisdiction here raised, to note the clear distinction between

the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether there is a claim which presents the federal question, and whether that claim is well founded when considered on its merits, are distinct and different questions. The one goes to jurisdiction, and the other to the merits of the case."

See also, *In re* Lennon, 150 U.S. 393, 400.

3. Unless the appellant's contention is correct, the circuit court would never have jurisdiction of a petition for habeas corpus, under that part of section 753 now under consideration, where at any stage of the case it should be of opinion that the petitioner was not in custody in violation of the Constitution or of a law or treaty of the United States, and a decision adverse to the petitioner would always be equivalent to a decision that the court had no jurisdiction, and no costs would in such case be taxable against the petitioner.

Mayor, etc., *v.* Cooper, 6 Wall. 247.

A person applying, therefore, for a writ of habeas corpus need never be deterred from so applying, because, unless the appellant's contention is correct, he could never be subjected to costs if he failed to establish his case, and the deterrent effect, which the law ascribes to liability to costs, in case of failure, would have no significance.

4. Prior to the Act of February 5, 1867, there was no statute regulating the matter of procedure when a petition for a writ of habeas corpus was presented, and the court followed in this respect the practice of common law.

See Report of Commissioners on Revision, sect. 227, note.

Under this practice the function of the application or petition was not to determine whether upon the facts alleged the petitioner should be discharged from custody, but whether the facts alleged showed "sufficient probable cause" for such discharge.

Sims's case, 7 Cush. 285, 291, and cases cited.

Rev. Stats., sect. 755, provides that:

"The court, or justice, or judge, to whom such application is made shall forthwith award the writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

This section is merely confirmatory of the practice previously prevailing. Thus in Watkins' case, 3 Pet. 201, Marshall, C.J., said: "The writ ought not to be awarded if the court is satisfied that the prisoner would be remanded."

It will be noticed that nothing in the language of sect. 755 directly forbids the court to issue the writ, even if "it appears from the petition itself that the party is not entitled thereto"; in other words, when the petition is presented, the court may elect which of two courses of procedure it will adopt; either at once to deny the prayer of the petition, because the court is of opinion that it does not set forth a case entitling the petitioner to the relief prayed for, or to issue the writ and determine, after a final hearing, whether the prisoner shall be remanded or discharged or otherwise disposed of, as law and justice require.

Rev. Stats., sect. 761.

In *Ex parte* Burrus, 133 U.S. 586, 591, Mr. Justice Harlan, after saying that "it should be made to appear upon the application for the writ that it is founded upon some matter which justifies the exercise of federal authority," uses this language:

"It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the petition is brought before the court, or justice, or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued, and it is *upon such hearing* to be finally determined whether his imprisonment or custody is in violation of the Constitution or laws or treaties of the United States."

But if, as the opinion of the learned judge in the court below would seem to indicate, a determination that the prisoner is in custody in violation of the Constitution or of a law or treaty of the United States is a prerequisite of jurisdiction, then it follows

that the court must in every instance determine such question at the outset, however difficult such determination may be, for, as was said by Chief Justice Marshall in Cohen *v.* Virginia, 6 Wheat. 264, 404:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Therefore, if the determination that the prisoner is in custody in violation of the Constitution or of a law or treaty of the United States is a prerequisite to jurisdiction, the language of Mr. Justice Harlan above quoted, in *Ex parte* Burrus, that "the court or judge who is asked to issue such writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction," is meaningless.

In *Ex parte* Terry, 128 U.S. 289, 301, Mr. Justice Harlan, in discussing the subject, says: —

"Its general duty in such cases is also prescribed by statute . . . (Rev. Stats. 754, 755). The writ *need not* therefore be awarded, if it appear upon the showing made by the petitioner that if brought into court and the cause of his commitment inquired into he would be remanded to prison."

If it was obligatory, and not discretionary, to refuse the writ where the court was of opinion that the prisoner was not in custody in violation of the Constitution or of a law or treaty of the United States, and if, therefore, it was the peremptory duty of the court to refuse the writ in such case, it is submitted that this court would have said not that the writ "*need not* be awarded," but that the writ *must not* be awarded.

The strength of the above contention is further shown by the fact that an examination of numerous cases where the issue of the writ was denied, because it appeared from the petition itself that the party was not entitled thereto, fails to disclose a single instance in which the denial of the petition was placed upon the ground that the court had no jurisdiction to issue the writ.

In view of the foregoing authorities it is submitted that the learned justice in the lower court, even if he was satisfied that the facts alleged in the petition would not justify the issuing of the writ, might, nevertheless, in his discretion have ordered the writ to issue, and have disposed of the case after a return had been made to the writ, and after a "full inquiry into the cause of commitment or detention."

Ex parte Burrus, *supra*.

And if such discretion existed, it plainly follows that, on whatever other ground he might refuse to issue the writ, he could not so refuse on the ground of want of jurisdiction.

III.

The Questions Presented by the Present Petition are not Fraudulent, Fictitious, or Frivolous.

It has been said that the general doctrine giving jurisdiction where a claim is made involving the construction of the Constitution of the United States or a treaty of the United States is subject to the qualification that such claim must not appear to be fraudulent, fictitious, or frivolous. Thus in Southern Pac. R. Co. *v.* Cal., 118 U.S. 112, Mr. Chief Justice Waite says:

"The right of removal does not depend upon the validity of the claim set up under the constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit."

So in Insurance Co. *v.* Austin, 168 U.S. 695, Mr. Justice White says:

"Of course the claim must be real and colorable, not fictitious and fraudulent."

No direct adjudication turning upon this qualification in cases of habeas corpus has come to the attention of counsel, unless the decision of the learned justice in the court below is to be so regarded. Assuming that the qualification exists, the appellant contends that it has no application to the present case. The learned justice in his opinion dismissing the petition for want of jurisdiction based such dismissal upon three grounds:

1. Because the petition failed to show that the legislature of Massachusetts had omitted to do its duty, and that the alleged apprehended injury would arise, not from any failure of the legislature, but from the alleged misconduct of the warden of the state prison, and it was said that "the Fourteenth Amendment does not apply where the legislature has done its duty, and where the fault is incidental, either with the courts or with the officials."

2. Because the petitioner failed to allege that the appellant, being a subject of the king of Italy, was not enjoying, as provided by article 3 of the Italian treaty, the same privileges and rights in legal proceedings which are enjoyed by the natives of this country.

3. Because the question arising under the twenty-third article of said treaty was at the time pending in this court on appeal.

An allusion was made to the circumstance that under the decision in Minnesota *v.* Brundage, 180 U.S. 499, the appellant should have exhausted his remedies in the state court before applying to the federal court, but such failure to exhaust state remedies was explicitly declared not to be the ground upon which the judgment in fact rested, and was a subject appealing to the discretion of the court, and not a jurisdictional defect, as was directly held in the last mentioned case.

It is respectfully submitted that none of the reasons assigned by the learned justice bring the case within the above qualification.

1. The operation of the Fourteenth Amendment is not confined, as asserted in the opinion of the learned justice, to cases where the legislature has not done its duty, but has been repeatedly held by this and other federal courts to cover cases where, as in the present case, a person was in danger of being deprived of his life or liberty or property through the unlawful

action of the instrumentalities of the state, either legislative, executive, or judicial, or by any person acting by virtue of public position under a state government, and enabled by reason of his position so to act.

C. B. & Q. R. Co. *v.* Chicago, 166 U.S. 226, 233.
Ex parte Virginia, 100 U.S. 339.
United States *v.* Ryan, 109 U.S. 3.
Scott *v.* McNeil, 154 U.S. 34.
Smoot *v.* Ky. Central R.R. Co., 13 Fed. Rep. 337.
Nashville, etc., R.R. Co. *v.* Taylor, 86 Fed. Rep. 168.
Ex parte Ulrich, 42 Fed. Rep. 587.
In re Kelley, 46 Fed. Rep. 653.
In re Friedrich, 51 Fed. Rep. 747.

In C. B. & Q. R. Co. *v.* Chicago, *supra*, Mr. Justice Harlan says, at p. 233:

"But it must be observed that the prohibitions of the amendment (Fourteenth Amendment) refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

It is unnecessary for the appellant, in a discussion of the question of jurisdiction, to reconcile the above authorities with the decision in Arrowsmith *v.* Harmoning, 118 U.S. 194, cited by the learned judge in his opinion, and the line of cases following Arrowsmith *v.* Harmoning, if indeed any conflict can be said to exist between the two lines of cases. The very existence of conflicting decisions conclusively shows that a claim in accordance with one of the lines can, in no proper sense, be said to be a fraudulent, fictitious, or frivolous claim. It is submitted, however, that Arrowsmith *v.* Harmoning, and kindred cases, are reconcilable with the above line of cases, upon which the appellant relies, by holding that "due process of law," *ex vi termini*, is with reference to state legislation what the judicial branch has

declared it to be, subject, of course, to limitations not yet accurately defined; but that the action of the executive and legislative branches cannot be said to determine what is due "process of law," at least in the absence of direct judicial action upon the particular case or cases similar to the one actually before the court. It cannot be asserted in the present case that the judicial branch of the state government has ever decided, or ever had an opportunity to decide, adversely to the appellant's main contention, namely, that the respondent, as warden of the state prison, has been given no authority in law to inflict the death penalty or to retain custody of the convict where the week appointed for execution has elapsed without execution having been done, and where there has been no lawful action in the way of pardon, commutation, or respite of sentence.

Furthermore, in view of the circumstance that Arrowsmith *v.* Harmoning was cited as establishing want of jurisdiction, it should be observed that in the last-mentioned case the court expressly declined to dismiss for want of jurisdiction, saying, "The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus *we probably have technical jurisdiction*. For this reason the motion to dismiss must be denied, but the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

Furthermore, the appellant's contention that the law of Massachusetts furnishes no authority in law to the respondent, as warden of the state prison, to inflict the death penalty or to retain custody of the convict where the week appointed for execution has elapsed without execution having been done, and where there has been no lawful action in the way of pardon, commutation, or respite of sentence, is supported by the statutes and decisions of Massachusetts.

At common law the court merely directed that the sentence of death should be inflicted, and the time and place of execution and the custody of the prisoner in the meantime were entirely in the discretion of the sheriff.

Ex parte Medley, 134 U.S. 160.
Costley *v.* Commonwealth, 118 Mass. 1, 35.

In 1777 the legislature of Massachusetts enacted that no person should be put to death on whom the sentence of death should be passed before the whole record of the case should be certified by the clerk of the court to the supreme executive authority of the state, nor until a warrant should be issued by said supreme executive authority directed to the sheriff of the county in which the trial was had, commanding him to cause execution to be done according to the judgment.

Stat. 1777, chap. 32, sect. 24.

This statute remained in force until 1876, and before and since the adoption of the Constitution of Massachusetts the court never fixed the time of execution of a sentence of death, but always left it to the determination of the executive.

Costley *v.* Commonwealth, *supra*.

In 1876 the legislature enacted a statute (Stats. 1876, chap. 166) which is found in Mass. Pub. Stats., chap. 214, sects. 32, 33, 34, and 35, the material parts of which statute, to wit, sects. 32 and 33, are set out at length on page 4 of the present brief. This statute purported to regulate the subjects of judgment in capital cases and the infliction of the death penalty and the custody of the prisoner between judgment and execution, and expressly repealed the previous statutes relating to those matters. Sect. 2 of the last mentioned Act, which is sect. 33 of chap. 215 of Pub. Stats., provided that "in case the sentence is not executed on the day finally appointed the sheriff shall cause execution to be done as soon as may be after the said day finally appointed."

The statute of 1876, chap. 166, continued in force until the enactment of the statute of 1898, chap. 326, under which the petitioner was sentenced, and to which alone reference must be made for the respondent's authority either to hold the petitioner in custody or to inflict the death penalty. It is elementary that no authority existed in the warden of a state prison at common law, and it therefore follows that his authority, being in derogation of the common law, must be strictly construed.

Stats. 1898, chap. 326, sect. 11, repeals sect. 32 of the Mass. Pub. Stats., and fails to give any authority to the warden of the state prison, after the expiration of the week within which execution was appointed to be done without execution having been done, and in the absence of any lawful pardon, commutation, or respite of sentence, either to hold the petitioner in custody or to inflict the death penalty, and therefore the respondent is holding the appellant in custody without authority at the present time and he is entitled to be discharged.

2. The learned judge failed to find any allegation that a discrimination had been made between the appellant, a subject of the king of Italy, and natives of this country. It is submitted that such discrimination is set forth in the second, sixth, and eighth assignments, the purport of which was that the respondent, contrary to law, — that is, contrary to what he is under obligation to do, and to what, therefore, he presumably would do in the case of other persons, — is holding the appellant in custody and proposing to inflict the death penalty. If an American citizen was about to be put to death by an executive officer of the Italian government, acting under color of his office but contrary to the law of Italy, it seems evident that such unwarranted action would be treated as a violation of treaty rights.

3. The third reason assigned by the learned judge for his denial of jurisdiction is the pendency of an appeal in which the interpretation of the twenty-third article of the Italian treaty was among other questions involved. Whatever effect such pendency might have in justifying a refusal to consider the question then pending, or to postpone a decision thereon until it had been passed upon by this court, such pendency cannot, it is respectfully submitted, have any bearing upon the power of the court to take jurisdiction.

Respectfully submitted,

WILLIAM M. STOCKBRIDGE,
G. PHILIP WARDNER,
Counsel for Appellant.

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Br. of Knowlton & Cook for Appellee (on mo. to adv.)

Filed Oct. 14, 1901.

Supreme Court of the United States.

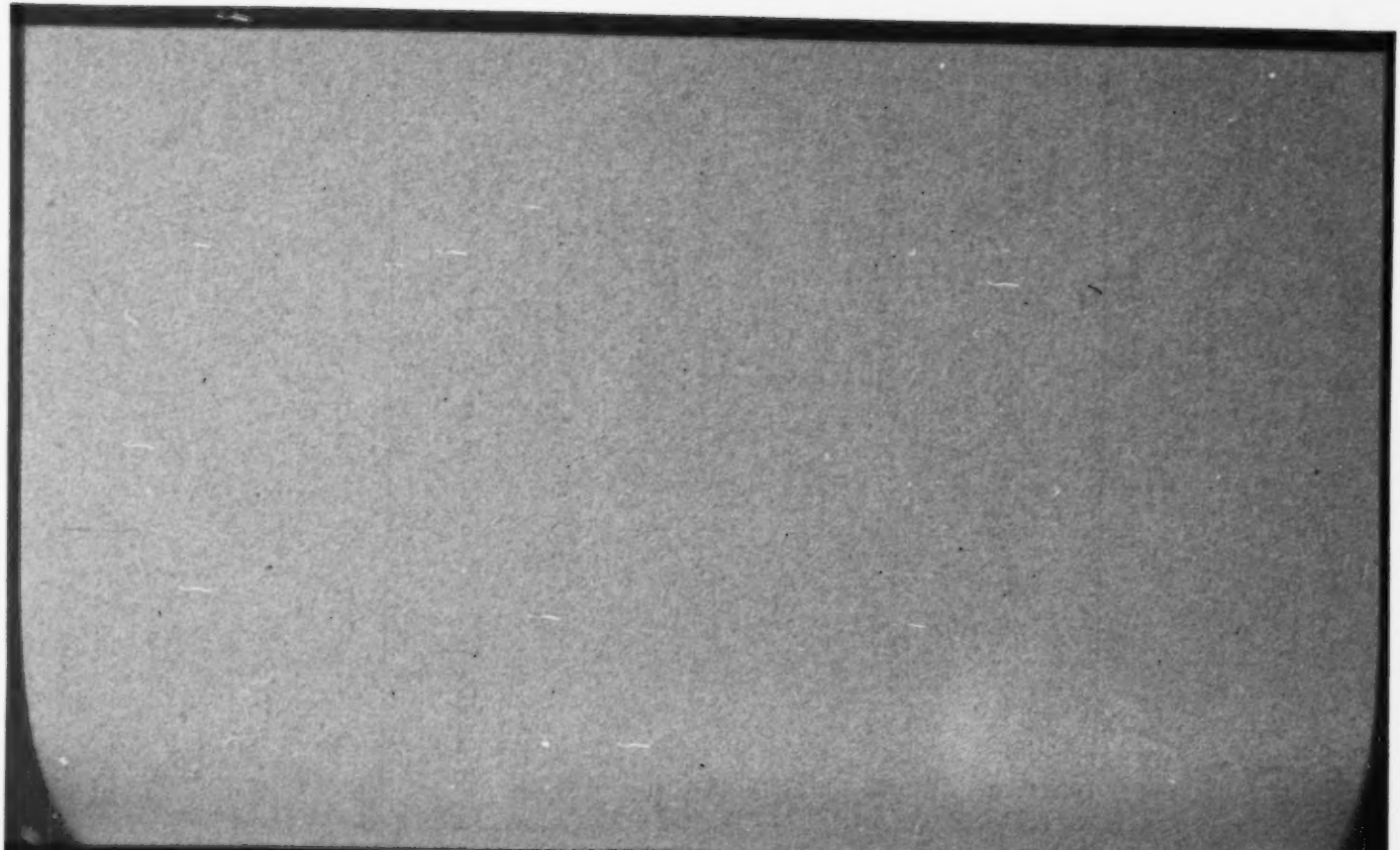
LUIGI STORTI, Petitioner for Writ of Habeas Corpus, Appellant,

v.

BENJAMIN F. BRIDGES, Warden of the Massachusetts State Prison, Appellee.

No. 378. October Term, 1901.

MOTION OF APPELLEE TO ADVANCE.



Supreme Court of the United States.

No. 378. October Term, 1901.

Luigi Storti, Petitioner for Writ of Habeas Corpus, Appellant,

v.

Benjamin F. Bridges, Warden of the Massachusetts State Prison, Appellee.

ON APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Motion to Advance.

Benjamin F. Bridges, Warden of the Massachusetts State Prison, Appellee, moves that this cause be advanced upon the docket of the court, to be heard and argued on October 28, 1901, in the place of the case of Storti, Petitioner for writ of Habeas Corpus, Appellant, *v.* Massachusetts, *et al.*, No. 325, assigned for hearing on October 28, 1901.

Statement of the Case.

The petitioner was sentenced on Jan. 4, 1901, to suffer the punishment of death by the passage of a current of electricity through his body, within the week beginning on Sunday, the seventh day of April, 1901, in accordance with the provisions of the Massachusetts

Statutes of 1898, chapter 326. On April 9, 1901, the Governor of the Commonwealth of Massachusetts respited his sentence, the term of the respite to expire on Saturday, the eleventh day of May, 1901. On May 10, 1901, the petitioner filed a petition for a writ of habeas corpus in the Circuit Court of the United States for the district of Massachusetts, and on May 11, 1901, a hearing was had and an order was entered denying the petition. The petitioner thereupon appealed to this court, and that appeal is now pending as Storti v. Massachusetts, No. 325, October Term, 1901, and on May 27, 1901, it was assigned for argument on Oct. 28, 1901. Before the appeal in said case No. 325 was entered in this court, to wit, on May 15, 1901, the Governor of Massachusetts again respited the sentence of the petitioner, the term of the respite to expire on May 25, 1901; and again, after motions to suspend paragraph 4 of Rule VI. of this court, and to dismiss the appeal in said case No. 325 had been denied, to wit, on May 29, the Governor of Massachusetts respited the petitioner's sentence, the term of respite to expire on Nov. 9, 1901. During the term of the petitioner's second respite and after the appeal in said case No. 325 had been entered in this court, to wit, on May 23, 1901, the petitioner brought this second petition for a writ of habeas corpus in the Circuit Court of the United States for the District of Massachusetts, and his petition was denied on the ground of the want of jurisdiction of the Circuit Court, and the circuit judges who heard the case have so certified to this court.

In re Storti, 109 Fed. Rep. 807.

An appeal to this court was allowed by Mr. Justice Gray on June 21, 1901. The principal allegation in the petition is that "there has been no further *lawful* pardon, commutation or respite of sentence by the Governor" since the expiration of the first respite on May 11, 1901. There are general allegations in the petition that the petitioner is deprived of his liberty without due process of law, and denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and that he may be deprived of certain rights guaranteed by the treaty with Italy, but they are not supported by any allegations of fact.

REASONS FOR THIS MOTION.

The appellant and the appellees have entered into an agreement, which has been filed in this court, that the case of Storti, Petitioner, *v.* Massachusetts, No. 325, October Term, 1901, may be dismissed when reached for argument, on October 28, 1901. There is no federal question presented by the petitioner in this case, and the due course of justice in Massachusetts requires that this case should be advanced and disposed of.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

ARTHUR W. DEGOOSH,
Assistant Attorney-General.

The appellant assents to the allowance of the above motion.

By his attorneys,

No. 378.

Brf. of Knowlton & DeGoosh for Appellees

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Clerk.

Filed Nov. 7, 1901.

Supreme Court of the United States.

No. 378. October Term, 1901.

LUIGI STORTI, *Petitioner for Writ of Habeas Corpus*, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS and BENJAMIN F. BRIDGES, Warden of the State Prison, *Appellees.*

On Appeal from the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE COMMONWEALTH AND FOR BENJAMIN F. BRIDGES.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

ARTHUR W. DeGOOSH,
Assistant Attorney-General of Massachusetts.

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Supreme Court of the United States.

No. 378. October Term, 1901.

LUIGI STORTI, *Petitioner for Writ of Habeas Corpus*, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS and BENJAMIN F. BRIDGES, Warden of the State Prison, *Appellees.*

On Appeal from the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE COMMONWEALTH AND FOR BENJAMIN F. BRIDGES.

History of Proceedings.

The petition states with some detail the proceedings which have been had by and with reference to the petitioner. Some of them do not appear to be material to the consideration of the present appeal, but for convenience they may be summarized as follows: —

The petitioner, Luigi Storti, was duly indicted in the Superior Court for the county of Suffolk in the State of Massachusetts on the ninth day of December, 1899, for the murder of one Michele Calcucci. He was tried before a jury and found guilty in the first degree. The verdict was rendered July 1, 1900. Certain exceptions were taken by him at his trial. These exceptions were overruled by the Supreme Judicial Court of Massachusetts Jan. 2, 1901. *Commonwealth* v. *Storti*, 177 Mass. 339. On Jan. 4, 1901, he was sentenced, in accordance with the provisions of the Massachusetts statutes of 1898, chapter 326, to suffer the punishment of death by the passage of a current of electricity through his body within the week beginning Sunday, April 7, 1901. On April 9, 1901, the Governor of Massachusetts, by and with the advice and consent of

the Executive Council, respited his sentence, the term of the respite to expire on Saturday, May 11, 1901.

Meanwhile, to wit, on the thirteenth day of April, 1901, the petitioner filed a petition for a writ of *habeas corpus* and a petition for a writ of error in the Supreme Judicial Court of Massachusetts, both petitions raising the same question, to wit, that the punishment of death by electricity was a "cruel or unusual punishment," within Article 26 of the Massachusetts Declaration of Rights. These petitions were argued together, and the petition for a writ of *habeas corpus* was denied, and in the writ of error the judgment of the Superior Court was affirmed. These decisions were rendered on May 7, 1901, being four days before the expiration of the respite granted by the Governor. The opinion of the court is printed on page 28 of the record.

On the 10th day of May, 1901, which was but one day before the expiration of the respite granted by the Governor, the prisoner filed in the Circuit Court of the United States for the District of Massachusetts a petition for a writ of *habeas corpus*. This petition set forth the same matters urged in the petition for a writ of *habeas corpus* before the Supreme Judicial Court of Massachusetts, and some others not material now to be restated, excepting that they are not in substance or in form the allegations contained in the present petition. This petition was heard by the Circuit Court on May 11, 1901, and summarily denied. The petitioner thereupon appealed to the Supreme Court. The appeal was entered at the last term and is now docketed as No. 325, October Term, 1901. It was entered a few days before the expiration of the term. A motion was made by the Attorney-General of Massachusetts to have the appeal dismissed as frivolous. But owing to the requirement of the rules of this honorable court that three weeks' notice must be given of hearings upon such motions it was impossible to have the motion entertained before the adjournment of the court. The petition, therefore, went over until October, and was assigned for argument on the 28th day of October, 1901. At the beginning of this term, the petition, having apparently accomplished its only purpose of delaying the administration of justice, was, by agreement of the petitioner, dismissed.

Meanwhile, to wit, on the 23d of May, 1901, the present petition for a writ of *habeas corpus* was filed in the Circuit Court of the United States. On May 24 a hearing was had and the petition

was dismissed on the ground of want of jurisdiction in the Circuit Court, and the circuit judge issued a certificate to that effect.

In re Storti, 109 Fed. Rep. 80. *Vid.* Record, p. 36. *Vid.* also 26 United States Statutes, chap. 517, § 5. U. S. Revised Statutes, § 753.

It may be added, to complete the historical statement, although the fact is not set forth in the record, that in consequence of a statute of the United States requiring a stay of proceedings during the pendency of the former writ of *habeas corpus*, that the Governor has from time to time respited the execution of the sentence. The last respite expires on the ninth day of November ensuing.

Statement of the Case.

This petition alleges in substance the trial, conviction and sentence of the petitioner, and the respite of the Governor as above stated. It describes the respite as a "purported" respite, and sets forth that it expires on Saturday, May 11; and further alleges as follows: "and there has been no further lawful pardon, commutation or respite of the sentence by the Governor as provided in section 3 of said chapter 326" (being the statute under which he was sentenced and which is hereinafter set forth). The petition further sets forth that on May 10, 1901, the day before his respite expired, the petitioner filed in the Superior Court a motion for a new trial. This motion was filed under the provisions of the Public Statutes of Massachusetts, chapter 214, section 28 (said statute is hereinafter set forth). The petition further alleges that the motion is still pending and undetermined. The prisoner is alleged to be a subject of the kingdom of Italy.

The assignments of reasons for the issuing of the writ are set forth in the record on pages 2 to 7, inclusive. With some prolixity and repetitions they set forth in substance the following grounds for the issuing of the writ, to wit:

Assignments 1 and 7. — That the week appointed by the court for the execution of the petitioner having elapsed without execution having been done upon him, and "without any lawful action by the Governor" in the way of respite, the respondent has no further authority to hold the prisoner or to inflict the death penalty, and that he is thereby denied his rights under the first section of the Fourteenth Amendment to the Constitution of the United States.

Assignments 2 and 8. — (After allegations similar to those in assignments 1 and 7) That the holding of the prisoner is in violation of his rights under the "third article of the now existing treaty between the United States of America and his majesty the King of Italy and section 6 of article 6 of the Constitution. The article of the treaty relied upon is printed on page 6 of the record.

Assignment 3. — That in consequence of the sentence to death to be performed within the period of a year the petitioner's rights to move for a new trial under the provisions of Public Statutes, chapter 214, section 28, are taken away in violation of the rights guaranteed to him by the first section of the Fourteenth Amendment to the Constitution.

Assignment 4 is the same as assignment 3 excepting that the allegations of assignment 3 constituted a violation of his rights under the treaty.

Assignment 5 is similar to assignments 3 and 4.

Assignment 6. — The prisoner alleges that he apprehends that he may be executed while the motion for a new trial in the state court is pending, and alleges that if he is so executed his rights under the Fourteenth Amendment, and under the treaty aforesaid, may be cut off.

Statutes of Massachusetts referred to in this Brief.

Sts. 1898, c. 326.

An Act to regulate the Infliction of the Death Penalty.

Section 1. In pronouncing sentence of death upon a person convicted of a capital crime the court shall appoint a week within which such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence, and shall immediately thereafter make out, sign and deliver to the sheriff of the county a warrant, under the seal of the court, stating the conviction and sentence, and the week appointed for the execution thereof, and shall at the same time transmit to the warden of the state prison a certified copy of the warrant. Such warrant shall be directed to the warden of the state prison, commanding the warden to cause execution to be done in accordance with the provisions of such sentence, upon some day within the week thus appointed.

Section 2. When a person is sentenced to the punishment of death he shall be confined in a jail or prison in the county in which

such sentence is pronounced until within ten days of the first day of the week appointed for the execution of the sentence. He shall, within such ten days, and at a time chosen by the sheriff of the county, be conveyed as secretly as may be, by the sheriff or such deputy as he may name, to the state prison, where the sentence is to be executed, and be delivered, together with the warrant, to the warden or the officer performing the duties of warden. From the time of such delivery until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the convict under sentence shall be kept in a cell provided for the purpose, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

SECTION 3. The sentence of death shall be executed by the warden of the state prison, or by a person or persons acting under the direction of the warden. Unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law, the execution shall be done within the week appointed by the court; and in case the execution is respited the sentence shall be executed within the week beginning on the day next after the day on which the term of respite expires. The execution shall be done upon such day as the warden shall select within the week determined as aforesaid, and at an hour between midnight and sunrise; but no previous announcement shall be made, except to the persons who shall be permitted to be present at such execution, as hereinafter provided.

SECTION 4. The punishment of death shall be inflicted within an enclosure or building provided for the purpose, adjoining the state prison.

SECTION 5. Beside the warden or deputy warden performing the execution, and such officers of the state prison as the warden may deem necessary, there shall be present at the execution the prison physician, the surgeon general of the militia, and the medical examiner of the district in which the state prison is situated, or, in case of their inability to be present, such physicians as the warden may approve, and the members of the medical profession present shall be the legal witnesses of the execution. There may also be present the sheriff of the county in which the sentence was pronounced, or his deputy, and a priest or minister of religion, and, with the approval of the warden, not more than three other persons.

SECTION 6. The punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

SECTION 7. When a warden inflicts the punishment of death upon a convict in obedience to a warrant from the court, he shall, as soon as may be, make return thereof under his hand, with the doings thereon, to the office of the clerk of said court.

SECTION 8. Nothing in this act shall apply to a person sentenced to death for a crime committed at any time before the passage of this act. The provisions of law for the infliction of punishment of death in existence at the time of the passage of this act are hereby continued in existence and applicable to all persons sentenced to death for crimes committed before the passage of this act.

SECTION 9. The warden of the state prison shall cause to be provided, in conformity with plans approved by the governor and council, the necessary building and appliances for the infliction of the punishment of death, in accordance with the requirements of this act. For the expenses of constructing such building and providing such appliances, including the necessary expenses of the warden in connection therewith, a sum not exceeding seven thousand five hundred dollars shall be allowed and paid out of the treasury of the commonwealth.

SECTION 10. The company furnishing electric power or light to the state prison shall provide all necessary electricity for executions at such times as the warden may direct.

SECTION 11. Sections thirty-two, thirty-three, thirty-seven, thirty-eight and thirty-nine of chapter two hundred and fifteen of the Public Statutes are hereby repealed.

SECTION 12. This act shall take effect upon its passage. [*Approved April 13, 1898.*]

Pub. Sts. c. 214, § 28.

"The supreme judicial court and superior court may at the term in which the trial of an indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on such terms or conditions as the court shall direct."

ARGUMENT.

Assignments 1 and 7 allege that the week appointed by the court for the execution of the petitioner having elapsed without execution having been done upon him and without any lawful action by the Governor in the way of respite, the respondent has no further authority to hold the prisoner or to inflict the death penalty, and that he is therefore denied his rights under the first section of the Fourteenth Amendment to the Constitution of the United States.

It is to be observed that these assignments in effect deny the legality of the first respite granted to the prisoner. It is not denied that this respite was granted under and in conformity to the provisions of the Massachusetts statutes of 1898, chapter 326, section 3. No allegation is made that the section in question is unconstitutional and no particular is pointed out in which the Governor failed to conform to the provisions of the statute. It is to be observed that the petitioner admits that the Governor of Massachusetts "purported" to respite his sentence, and he does not specify wherein the respite was unlawful. Nor does he deny that he was lawfully placed in the custody of the respondent. The respondent is unable to perceive how any federal question can arise upon the legality of that respite.

It is presumed, however, that the assignments intend indirectly to challenge the subsequent respites granted by the Governor, and of which, without doubt, the petitioner was fully informed. The language of the assignments is peculiar, its allegation being that the week appointed for execution elapsed "*without any lawful action by the Governor*" in the way of respite. Whether the language of these assignments is to be interpreted as an allegation that whatever action was taken by the Governor was unlawful, or, on the other hand, as an allegation that no action whatever was taken, and that, therefore, the respondent is holding him without any process of law whatever, the jurisdiction of the Circuit Court did not reach the case.

Lambert *v.* Barrett, 157 U. S. 697.

There is no allegation that the Statute of 1898, chapter 326, is unconstitutional or that the courts of Massachusetts have failed to protect the rights of the petitioner whenever they have been properly asserted. In that respect the petition is insufficient and no question of constitutional law is presented.

Whitten *v.* Tomlinson, 160 U. S. 231, 242.

If, however, the petitioner is proposing to contend that some provision of the Massachusetts statute has been violated, his remedy is not in the federal courts, but before the State court. It was not the intention of the various federal statutes relating to *habeas corpus* that questions involving the construction of State statutes not alleged to be unconstitutional should be tried out by a writ of *habeas corpus* from the federal courts. The only exception to this rule is when there is an allegation supported by sufficient allegations of fact that the provisions of the United States Constitution have been violated. It is not sufficient to allege that the prisoner is held without law, or that his sentence was not lawfully respited. Such general averments do not give jurisdiction to the federal courts.

But if, on the other hand, the language of the assignments is intended as an allegation that all lawful authority of the respondent has ceased and that he is holding the petitioner without process of law, then the State is eliminated from the controversy and it becomes a mere question between the respondent acting without authority and the petitioner, and the provisions of Revised Statutes, section 753, apply. This section is as follows: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the constitution or of a law or treaty of the United States." The Fourteenth Amendment does not confer upon the federal courts jurisdiction to correct erroneous or wilfully improper acts of State officers or State courts in violation or in disregard of law.

U. S. *v.* Cruikshank, 92 U. S. 542, 554.
Virginia *v.* Rives, 100 U. S. 313, 318.
United States *v.* Harris, 106 U. S. 629, 638.
Civil Rights Cases, 109 U. S. 3, 11, 13.
Logan *v.* United States, 144 U. S. 263, 290.
Arrowsmith *v.* Harmoning, 118 U. S. 194, 196.

Assignments 2 and 8 allege that the petitioner is held in violation of the third article of the treaty between the United States and his majesty the king of Italy. The language of the treaty is quoted on page 6 of the record.

The same considerations which have been suggested with reference to the first and seventh allegations, as above set forth, apply to these assignments. The general allegation that the petitioner is held

in violation of this section of the treaty is insufficient to confer jurisdiction.

Whitten *v.* Tomlinson, 160 U. S. 231, 242.

Moreover, the treaty, like the Fourteenth Amendment, is directed to the government of the United States and the several states, and not to citizens thereof.

Assignments 3, 4 and 5 allege that he was unlawfully imprisoned because his execution would deprive him of the right to file a motion for a new trial within the year provided by chapter 214, section 28, above quoted.

These assignments do not raise a federal question. The interpretation to be given to the Public Statutes of Massachusetts, chapter 214, section 28, is a question for the state courts alone. Moreover, inasmuch as more than a year has elapsed since the term in which the trial of the petitioner's indictment was had, the question is now moot; and, further, a motion for a new trial has been filed and is pending.

These assignments show no proper ground for *habeas corpus*. A judgment in favor of the plaintiff under such a petition would entitle him to be discharged. It is obvious that he has no right to be discharged, but only to have his life preserved until he could have an opportunity of presenting a motion for a new trial, unless it be claimed now for the first time (as, indeed, is expressly stated in the assignment), that by reason of the failure to sentence him to be executed at a time more than one year from the date of the sentence, made the whole proceeding void. That is not a federal question.

Assignment 6 sets forth the apprehensions of the prisoner lest the respondent may disregard the statutes giving him an opportunity to present a motion for a new trial and cut off his right so to do by executing him. The respondent deems this assignment too obviously and characteristically frivolous to require argument at his hands.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

ARTHUR W. DEGOOSH,
Assistant Attorney-General of Massachusetts.

Office Supreme Court U. S.
FILED
NOV 18 1901
JAMES H. McKENNEY,
Clerk

No. 378.

Motion to issue mandate &c.

Filed Nov. 18, 1901.

Supreme Court of the United States.

No. 378. OCTOBER TERM, 1901.

LUIGI STORTI, *Petitioner for Writ of Habeas Corpus*, APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS AND BENJAMIN F. BRIDGES, WARDEN, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION THAT MANDATE ISSUE FORTHWITH AFTER JUDGMENT.

Supreme Court of the United States.

No. 378. October Term, 1901.

LUIGI STORTI, *Petitioner for Writ of Habeas Corpus*, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS and BENJAMIN F. BRIDGES, *Appellees.*

On Appeal from the Judgment of the Circuit Court of the United States for the District of Massachusetts.

Motion by Respondents.

Now come the respondents and respectfully move that a mandate to the circuit court issue forthwith as soon as a decision shall be reached by this honorable court in the above entitled cause, for the following reason, to wit: the petitioner is under sentence of death upon conviction in the superior court for the Commonwealth of Massachusetts; a respite of said sentence has been granted to the petitioner by the Governor of Massachusetts, which respite expires on the thirtieth day of November current, and if the period of thirty days named in Rule 38 of this honorable court be observed said period will not expire until after the expiration of said respite.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

No. 378.

Office Supreme Court
FILED
NOV 20 1901
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

LUIGI STORTI, Appellant,
vs.
THE COMMONWEALTH OF MASSACHUSETTS ET AL. } No. 378.

Opinion of the Circuit Court of the United States for the District of Massachusetts.

In re STORTI.

(Circuit Court, D. Massachusetts. May 24, 1901.)

No. 1122 A.

1. Federal courts—*Habeas corpus*—Jurisdiction.—To give a circuit court of the United States jurisdiction to grant a writ of *habeas corpus* under the provision of Rev. St. § 753, that the writ "shall in no case extend to a prisoner in jail unless he * * * is in custody in violation of the Constitution or of a law or treaty of the United States," it is not sufficient for the petition to allege generally that the petitioner is held in violation of the Constitution or a law or treaty, but it must also set out the specific facts on which such allegation is based, which must be sufficient to sustain it if proved.*
2. Constitutional law—Due process of law.—Ordinarily, the provision of the fourteenth constitutional amendment, relating to due process of law, does not apply where the legislature of a State has performed its duty by providing for proceedings which answer the constitutional requirement, and where the fault is either with the courts or officers.
3. Same.—Following Durrant's case (C. C.) 84 Fed. 317, an appeal was denied.

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* Jurisdiction of Federal courts in *habeas corpus* proceedings. See note to *In re* Huse, 25 C. C. A., 4.

Petition for writ of *habeas corpus*.

W. M. Stockbridge and G. Philip Wardner, for petitioner.
A. W. De Goosh, ass't att'y gen., for Commonwealth of Massachusetts.

Before Putnam, circuit judge, and Lowell, district judge.

PUTNAM, *Circuit Judge* (orally):

This is an application for writ of *habeas corpus* in behalf of a subject of the King of Italy, who is in jail in this Commonwealth as the result of a judgment and sentence of the State courts of Massachusetts finding him guilty of murder, and directing his electrocution. A petition in behalf of the same person, or by the same person, was filed a few days ago and denied, and an appeal was allowed to the Supreme Court, and that appeal is now pending there.

So far as we can discover, all the reasons which are stated in the line of cases closing with Minnesota *v.* Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. ed. —, apply here; and, so far as we can discover, the interference of this court would be simply an interference with the ordinary course of justice in the State courts, contrary to the frequent decisions of the Supreme Court that the inferior courts of the United States should not thus interfere. So far as we can discover, the petitioner has had, and now has, all the rights and privileges in the State courts, with the assurance of every protection, as fully as he could ask for any rights or privileges or for protection here. Nevertheless, as Minnesota *v.* Brundage may come before the Supreme Court for application to the peculiar circumstances of this case on the appeal that is now pending, we prefer not to rest our judgment on that case. Therefore we are compelled to look at the petition, and at the statute which governs.

In King's case, 12 C. C. A. 145, 64 Fed. 331, the question was settled, so far as the courts in this circuit can settle it, that a writ of *habeas corpus* may issue, based upon that provision of the Constitution which vests the Federal courts with power over controversies between citizens of different States, and between aliens and citizens of the several States. Down to the time of King's case, that proposition had never been ruled on; and it was contended that a writ of *habeas corpus* would not issue from the Federal courts, at least from the circuit court, except as incidental to the exercise of its jurisdiction. In King's case the court declined to take jurisdiction on the ground that, although there was diverse citizenship, it appeared that the person in whose behalf the writ was asked for was an inmate of an insane asylum. The Federal courts have no power to dispose of insane persons or persons afflicted with contagious diseases, and, therefore, if they should discharge such persons on writs of *habeas corpus*, they would have no power to dispose properly of them, and could only turn them into the street; and so the court declined to interfere in King's case. Also, in the present case, although, on the face of the record, so far as citizenship is concerned, we have jurisdiction, yet we are met by a statute of a prohibitory character, which provides expressly that

"the writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless" (stating various grounds which do not apply here) he "is in custody in violation of the Constitution, or of a law or treaty of the United States."

Now, this petition is very general in its allegations. It is not enough, in order to require this court to issue a writ of *habeas corpus*, that the petition alleges that the prisoner is held in violation of the Constitution of the United States, or of a treaty with a foreign nation, as was said in King's case. That is a mere formal allegation, covering conclusions of law as well as of fact; so it is necessary to look elsewhere in the petition for specific allegations raising an issue. In King's case there was a general allegation that King was detained in violation of the Constitution of the United States, but there was no specification of the facts on which that allegation was based, or from which it could be deduced; and the court declined to consider the petition on that ground, and therefore it was forced to investigate the question of diverse citizenship, to which we have referred already. In the present case the allegations of the petition are not very full in this particular, but still they are sufficient, together with the exhibits annexed to the petition, to enable us to determine whether or not there is anything in the petition which brings the case within the section of the Revised Statutes from which we have read; that is, whether or not there is enough to support the allegation that the petitioner is in custody in violation of the Constitution or of a law or treaty of the United States. Admitting that he is in jail, and in jail under some authority of somebody representing the State of Massachusetts, we cannot issue the writ unless we find, on the face of the petition, something which meets the express provision of the section which we have read. That question lies at the very threshold of our proceeding. It is a settled rule that a Federal court must take cognizance of the question of jurisdiction; and, where it is clear that it has no jurisdiction, it must dismiss the case, even if the suggestion is not made by the parties concerned. Therefore, before calling on the Commonwealth to reply to this petition, we required counsel to explain on what ground they base their claim of jurisdiction.

The first ground stated by them is the fourteenth amendment,—that part of it which relates to due process; but the case shows, beyond all question, that the legislature of Massachusetts has done its duty, and the only claim brought to our attention by the petition is that some one—the attorney general, the warden of the State prison, or somebody else—is not going to do his duty. Now beginning with the case of Arrowsmith *v.* Harmoning, 118 U. S., 194, 6 Sup. Ct. 1023, 30 L. ed. 243, and following down through a long line of cases, and also through a line of parallel cases raising the same question, but in different forms, it is held that the fourteenth amendment does not apply where the legislature has done its duty, and where the fault is incidental, either with the courts or with officials. Therefore, so far as the fourteenth amendment is concerned, it is clear that we have no jurisdiction.

We come now to the allegations based on the treaty with the King

of Italy. One is a provision guarantying the subjects of the King of Italy all the same privileges and rights in legal proceedings which are enjoyed by the natives of the country. We have utterly failed to hear anything which amounts even to a suggestion of any discrimination with reference to that article of the treaty. So far as the twenty-third article is concerned, we decline to take jurisdiction, because we are satisfied that the question has already been before this court on a previous petition, and is now pending in the supreme court on appeal. It would be a matter of great presumption on our part to undertake to revise that question, when it is already before the supreme court even if we had any jurisdiction in reference thereto. While we have our views about it, we are not entitled to express any opinion in regard to the twenty-third article of the treaty.

Counsel may file their petition for appeal, which we will deny, because we consider the appeal frivolous. We will follow the circuit court for the ninth circuit in Durrant's case (C. C.) 84 Fed. 317, 322. We agree that we would better deny the appeal now, because that gives counsel an opportunity to seasonably reach the supreme court or some justice thereof, or to file a petition in the State courts for a writ of *habeas corpus*.

We will announce informally that no future application will be allowed to be filed in this court in this matter without leave, and no order of notice will issue without at least a *prima facie* showing to some judge. Whether or not we will adopt that practice generally with reference to this class of applications, we have not determined; but, so far as this petition is concerned, we reserve the right to direct the clerk to receive no petition for writs of *habeas corpus* until application has been made to some judge for leave to file it; and also we now notify counsel that no new order of notice will issue as of course, and that we reserve the right to determine, in the first instance, whether we will allow such orders of notice to issue. At the request of petitioner's counsel, although probably not necessary to do so, we expressly reserve to them a right to apply to the State courts.

Petition denied for want of jurisdiction, without prejudice as to applications for writs of *habeas corpus* to the State courts.

MEM.—The appeal from the order denying the above petition was afterwards allowed by Mr. Justice Gray.

Supreme Court of the United States.

No. 378.—October Term, 1901.

Luigi Storti, Appellant, *vs.* The Commonwealth of Massachusetts and Benjamin E. Bridges, Warden of the State Prison at Boston, Massachusetts.	Appeal from the Circuit Court of the United States for the District of Massachusetts.

[December 2, 1901.]

On May 23, 1901, the appellant filed in the Circuit Court of the United States for the District of Massachusetts his petition in *habeas corpus*.

In that petition he stated that he was a citizen of Italy, and a subject of its king; that he was detained by the respondent under a warrant issued by the superior court of Suffolk County, reciting a conviction of murder, and directing the warden to inflict death by passing a current of electricity through him; that the time fixed for the execution of the sentence was on the week beginning April 7, 1901; that on April 9, 1901, the governor, with the advice of the council, issued a document purporting to respite the execution of sentence, the respite to expire on Saturday May 11, 1901; that on May 10, 1901, he presented a petition for a writ of *habeas corpus* to the said Circuit Court, which petition was denied on May 11, 1901; that from such denial he forthwith claimed and was allowed an appeal to the Supreme Court of the United States, and that such appeal was there pending and undetermined. The petition further stated that on May 10 he filed in the superior court for the county of Suffolk a motion for a new trial, in accordance with the provisions of the Massachusetts statutes, which motion was still pending and undetermined.

Upon these facts he asserted, first, that no law of Massachusetts provided for the punishment of a person sentenced to death, where the week appointed by the court for the execution had elapsed without execution and without any lawful action by the governor in the way of pardon, commutation or respite, and therefore that the detention by the warden was contrary to the provisions of the first section of the Fourteenth Amendment of the Federal Constitution; second, that for the same reason the detention was contrary to the third article of the treaty between the United States of America and His Majesty the King of Italy, (17 Stat. 845,) and contrary to section 2 of Article 6 of the Constitution of the United States; third, that by section 28 of chapter 214 of the Public Statutes of Massachusetts the court in which the trial of an indictment is had may at the term of the

trial, or within one year thereafter, grant a new trial; that therefore execution could not lawfully be done upon him until the expiration of a year from the term at which he was convicted, to wit, in this case before July 1, 1901, and that the execution of the sentence before that date would deprive him of his life without due process of law, and would deny to him the equal protection of the laws, contrary to the first section of the Fourteenth Amendment; fourth, that for the same reason the execution of the sentence would be contrary to the third article of the treaty between the United States and Italy; fifth, that the execution of the sentence within the year would deprive him of his right under the statutes of Massachusetts to move for a new trial within the year, and of his right to be present at the decision of such motion, which right was guaranteed to him by article 23 of the treaty between the United States and Italy, which reads as follows: "The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials;" sixth, that the motion for a new trial which he had filed on May 10 not having been determined, execution could not lawfully be done upon him until the decision of that motion, notwithstanding which he had reason to apprehend that the respondent intended to immediately, upon the determination of the appeal to the Supreme Court of the United States, cause execution to be done upon him, which execution would deprive him of his rights under the Fourteenth Amendment and article 23 of the treaty; seventh, that the respondent derives his authority to hold the petitioner in custody solely by virtue of the provisions of chapter 326 of the Massachusetts Statutes of 1898, and that by them no authority was given to him to retain the custody of the petitioner after the expiration of the week appointed by the court for the execution of the sentence, except through the lawful action of the governor in granting a respite, that no lawful action had been taken by the governor in the matter, and that therefore the petitioner was detained of his liberty contrary to the Fourteenth Amendment: and, eighth, that for the same reason he was deprived of his liberty contrary to the Fourteenth Amendment and the third article of the treaty between the United States and Italy. The third article of the treaty between the United States and Italy, referred to in this petition, is as follows:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

On the presentation of this petition to the Circuit Court, that court dismissed the same for want of jurisdiction, without prejudice to an application to the courts of the State. (*In re Storti*, 109 Fed. Rep. 807.) A certificate of this fact was signed by the circuit judge, and from the order dismissing the petition an appeal was taken to this court.

Mr. Justice BREWER delivered the opinion of the Court.

The grounds set forth in this petition for a discharge by the Federal court of the petitioner from the custody of the warden are wholly without foundation, and the case is another of the numerous instances in which, as said by Mr. Chief Justice Fuller, in *Craemer* v. *Washington State*, (168 U. S. 124, 128:)

"Applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice."

It is an attempt to substitute a writ of *habeas corpus* for a writ of error, and to review the proceedings in a criminal case in the State court by such collateral attack rather than by direct proceedings in error—something which this court has repeatedly said ought seldom to be done. See, among other cases, *Baker* v. *Grice*, (169 U. S. 284;) *Tinsley* v. *Anderson*, (171 U. S. 101, 104, and cases cited in the opinion;) *Markuson* v. *Boucher*, (175 U. S. 184;) *Minnesota* v. *Brundage*, (180 U. S. 499.)

Many of the allegations in the petition are general and obscure, and it is not easy to determine therefrom in what particular the petitioner considers the proceedings against him to be in conflict with the Federal Constitution or the treaty with Italy.

Some of the matters presented involve only the construction of State statutes and should be determined by the courts of the State, whose determination in respect thereto is binding upon this court. It must be borne in mind that under section 763 of the Rev. Stat. the jurisdiction of the Federal court to issue a writ of *habeas corpus* is limited to "the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States," and to cases arising under the laws of nations.

With these considerations in mind we pass to notice more particularly the matters set forth in the petition. It is stated that the petitioner was sentenced to be put to death at a given time; that he was not then put to death on account of a respite granted by the governor, and that such respite was

unlawfully granted. Wherein the unlawfulness consisted is not stated, and whether it were lawful or not is a matter dependent on the laws of the State, and to be determined by its courts. The Federal Constitution neither grants nor forbids to the governor of a State the right to stay the execution of a sentence. So also it is said that under the Massachusetts statutes the party convicted has a year in which to file a motion for a new trial, and, therefore, no sentence can be executed on him until that time. Whether that be so or not is also a question depending on the statutes of the State, and to be determined by its courts. The State may see fit to postpone the execution of a capital sentence for a year, or provide that it shall be carried into effect more speedily, and what the State has provided in the matter is for its courts to decide.

It is averred that the proceedings in the Massachusetts courts are in conflict with the rights secured by the treaty between Italy and the United States, but the articles of the treaty referred to only require equality of treatment and that the same rights and privileges be accorded to a citizen of Italy that are given to a citizen of the United States under like circumstances, and there is nothing in the petition tending to show a lack of such equality of treatment. The petition, therefore, is plainly without merit.

But the principal contention of counsel is that the petition was dismissed by the Circuit Court for want of jurisdiction and a certificate thereof given, and that under section 5 of the act of March 3, 1891, (26 Stat. c. 517,) the only question that we can consider is one of jurisdiction, and the following cases are referred to: *Horner* v. *United States*, (143 U. S. 570;) *Chappell* v. *United States*, (160 U. S. 499;) *Press Publishing Company* v. *Monroe*, (164 U. S. 105,) and *Huntington* v. *Laidley*, (176 U. S. 668.)

We do not question that rule as applied to ordinary suits and actions, but section 761, Rev. Stat., provides as to *habeas corpus* cases that "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Proceedings in *habeas corpus* are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken without delay. Especially is this true when the *habeas corpus* proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in Federal courts, but is the

general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both State and Federal. The command of the section is "to dispose of the party as law and justice require." All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in *habeas corpus*.

As the petition presented no case entitling the petitioner to a discharge, as the grounds stated therein are absolutely frivolous, and as the result reached in the Circuit Court was in accordance with law and justice, the judgment is affirmed and it is further ordered that the mandate issue at once.

True copy.

Test:

Clerk Supreme Court, U. S.